Supreme Court, U.S.
FILED
JUN 22 2004

No. 03-1697

In The
Supreme Court of the United States

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, AND JOHN WOMACK,

Petitioners,

v.

JEANNETTE THOMPSON, AS PLENARY GUARDIAN OF, ROBERT MAGYAR AND CECILIA MAGYAR,

Respondents.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

PETITION FOR A WRIT OF CERTIORARI

DONALD A. SMITH, JR.
ANNE CAVANAUGH JONES
Counsel of Record
SMITH & TOZIAN, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
(813) 273-0063

Counsel for Petitioner-Officers

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a law enforcement officer may lawfully seize a person, although that person has not committed a crime, if the officer has probable cause to believe that there is a substantial likelihood that the person is a danger to himself or others.

2. Whether the clearly established law regarding qualified immunity from suit requires a court to separately analyze each officer's actions in determining that officer's entitlement to qualified immunity.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioners state that, in addition to Tampa Police Department Officers, Jarrod S. Douds, Franklin M. Drees, Victor Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo and John Womack, parties to the matter below include the City of Tampa, Jeanette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	7
REASONS FOR GRANTING THE PETITION	9
I. THE DECISION BELOW CONFLICTS WITH THE GREATER WEIGHT OF FEDERAL LAW HOLDING THAT A LAW ENFORCEMENT OFFICER MAY LAWFULLY SEIZE A PERSON, ALTHOUGH THAT PERSON HAS NOT COMMITTED A CRIME, IF THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE PERSON IS A DANGER TO HIMSELF OR OTHERS	12
II. THE DECISION BELOW CONFLICTS WITH CLEARLY ESTABLISHED LAW REGARDING QUALIFIED IMMUNITY REQUIRING A COURT TO SEPARATELY ANALYZE EACH OFFICER'S ENTITLEMENT TO QUALIFIED IMMUNITY	18
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Anthony v. City of New York, 339 F.3d 129 (2nd Cir. 2003) 14

Behrens v. Pelletier, 516 U.S. 299 (1996) 2

City of Hialeah v. Fernandez, 661 So. 2d 335 (Fla. 3d DCA 1995) 6

Chavez v. Martinez, 538 U.S. 760 (2003) 12

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

District of Columbia v. Evans, 644 A.2d 1008 (D.C. 1994) 14

Doby v. DeCrescenzo, 171 F.3d 858 (3rd Cir. 1999) 14, 15

Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003) 17

Glass v. Mayas, 984 F.2d 55 (2nd Cir. 1993) 14

Gooden v. Howard County, 954 F.2d 960 (4th Cir. 1992) (*en Banc*) 14

Graham v. Connor, 490 U.S. 386 (1989) 12, 15, 16, 17, 20

Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) 14

Hope v. Pelzer, 536 U.S. 730 (2002) ..... *passim*

Le Savage v. White, 755 F.2d 814 (11th Cir. 1985) 14

Linbrugger v. Abercia, 363 F.3d 537 (5th Cir. 2004) 13

Maag v. Wessler, 960 F.2d 773 (9th Cir. 1991) 14

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 2

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2

Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997) 14

TABLE OF AUTHORITIES – Continued

Page

O'Connor v. Ortega, 480 U.S. 709 (1987) 14

Palmore v. Sidoti, 466 U.S. 429 (1984) 2

R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) 2

Saucier v. Katz, 533 U.S. 194 (2001) ..... *passim*

Sherman v. Four County Counseling Ctr., 987 F.2d 397 (7th Cir. 1993) 14

Terry v. Ohio, 392 U.S. 1 (1968) 10

Thompson v. Douds, 852 So. 2d 299 (Fla. 2d DCA), *rev. denied by*, 871 So. 2d 872 (Fla. Mar 24, 2004) ..... *passim*

Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) 2

Villanova v. Abrams, 972 F.2d 792 (7th Cir. 1992) 14

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the United States Constitution 3, 4

Fourth Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution 3, 4

Article V, Section 3(b), Florida Constitution 7

28 U.S.C. § 1257 2

42 U.S.C. § 1983 ..... 3, 4, 20

Fla. Stat. § 316.130 ..... 4, 17

Fla. Stat. § 394.463 ..... 3, 5, 10, 14, 15

Fla. Stat. § 901.15 ..... 4, 17

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Florida Second District Court of Appeal's decision reversing the trial court's judgment granting the Petitioner-Officers qualified immunity from suit is reported in the Southern 2d Reporter as *Thompson v. Douds*, 852 So. 2d 299 (Fla. 2d DCA), *rev. denied by*, 871 So. 2d 872 (Fla. Mar 24, 2004) (App., *infra*, 1a). The Second District Court of Appeal's orders denying rehearing or clarification and granting the Petitioner-Officers' motion to withdraw and stay mandate are unreported. (App., *infra*, 2a & 3a). The trial court's order granting summary judgment is unreported. (App., *infra*, 1b). The Florida Supreme Court's order declining discretionary review of the Second District Court of Appeal's decision is also unreported. (App., *infra*, 1c).

JURISDICTION

The Second District Court of Appeal reversed the trial court's order granting the Petitioner-Officers immunity from suit on July 18, 2003. (App., *infra*, 15a, 19a). A motion for rehearing and/or clarification filed with the Second District was denied on August 26, 2003. (App., *infra*, 21a). The Second District granted the Petitioner-Officers' motion to withdraw and stay mandate on October 22, 2003. (App., *infra*, 22a). The mandate has not been reissued. The Petitioner-Officers filed their petition for review with the Florida Supreme Court, which rendered an order declining to accept jurisdiction on March 24, 2004. (App., *infra*, 1c).

Because the Florida Supreme Court declined to exercise its discretionary jurisdiction to review the claims

in this matter, pursuant to 28 U.S.C. § 1257, the Second District Court of Appeal's decision is considered an order from the highest court of Florida in which a decision could be had. See, *e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984); *R.J. Reynolds Tobacco Company v. Durham County*, 479 U.S. 130, 136 (1986); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954).

The Petitioner-Officers invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). They have no right under Florida law to further litigate the federal issues. See, *Tucker v. Resha*, 648 So. 2d 1187, 1190 (Fla. 1994) (concluding that an order denying summary judgment based upon a claim of qualified immunity is subject to interlocutory review to the extent that the order turns on an issue of law); (App., *infra*, 1c). Therefore, this is a case "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975).

Furthermore, denial of a claim of qualified immunity from suit, to the extent that it turns on an issue of law, is an appealable "final decision" under both federal and Florida law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (Fla. 1985); *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (concluding that a government official's right to avoid the burdens of trial and pretrial discovery can be peculiarly disruptive of effective government and that this right is important enough to support an immediate appeal); *Tucker*, 648 So. 2d at 1190.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The First Amendment to the United States Constitution provides, in relevant part, "[c]ongress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble[.]" (App., *infra*, 1d). The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated[.]" (App., *infra*, 1d).

Title 42, Chapter 21, subchapter I, section 1983 of the United States Code states, in relevant part, "[e]very person who, under color of any statute, . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" (App., *infra*, 3d). Florida Statutes Chapter 394, section 463, subsection (1) and (2)(a)(2), Florida's Mental Health Act, provide, in pertinent part:

> (1) A person may be taken to a receiving facility for involuntary examination if there is reason to believe that he/she is mentally ill and because of her mental illness:
>
> (a)(2) The person is unable to determine for himself or herself whether examination is necessary; and

> (b) There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future as evidenced by recent behavior . . . [.]
>
> (2)(a)(2) A law enforcement officer shall take a person into custody who appears to meet the criteria for involuntary examination . . . [.] (App., *infra*, 7d-8d).

Florida Statutes sections, 316.130 and 901.15 are also relevant to the issues discussed herein. Those provisions are set out in full in the Appendix. (App., *infra*, 4d-7d, 13d-18d).

STATEMENT OF THE CASE

The Respondents, Jeanette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar, referred to collectively as ("Mr. Magyar") filed the underlying action in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, in February of 2000, alleging claims against City of Tampa Police Officers, Jarrod S. Douds, Franklin M. Drees, Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo and John Womack, referred to collectively as the ("Officers") under 42 U.S.C. § 1983. Mr. Magyar asserted that the Officers violated his civil rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution because of alleged excessive use of force in detaining Mr. Magyar and taking him into custody. The action

includes state tort claims against the Officers for excessive force and battery.[1]

After extensive discovery, the trial court granted the Officers' motion for summary judgment for each Officer based upon their claims of qualified and state statutory immunity. The trial court made the following findings: (a) the Officers met their burden of showing that they acted within the scope of their discretionary authority; (b) a reasonable officer under the circumstances could believe he had a duty to take Mr. Magyar into custody and thus Mr. Magyar's detainment was justified under Fla. Stat. § 394.463(2)(a)(2), and did not violate his constitutional rights; (c) the undisputed facts, taken in the light most favorable to Mr. Magyar, failed to establish that any of the Officers violated "clearly established law" because: (1) the facts of Mr. Magyar's legal authorities materially differed from the facts of the Officers' actions in this case and (2) the facts failed to show that any of the individual Officers used excessive force against Mr. Magyar (App., *infra*, 4b, 6b). The trial court rendered its order on May 22, 2002. (App., *infra*, 8b).[2]

On June 27, 2002, this Court rendered its decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), specifically disapproving the standard employed by the Eleventh Circuit Court

---

[1] Plaintiffs also sued the City of Tampa. The City is not a party to this appeal.

[2] The trial court also found the Plaintiffs had failed to meet their burden of showing that any of the Officers' actions were "committed in bad faith or with malicious disregard of human rights, safety and property," and thus that the Officers were statutorily immune from suit for the state tort claims alleged by the Plaintiffs. (App., *infra* at 1b).

of Appeals to decide whether law is "clearly established" for purposes of determining qualified immunity. In *Hope*, the Court rejected the Eleventh Circuit's requirement that the facts of the case at issue be "materially similar" to the facts of other cases or another case in order for law to be "clearly established." *Hope*, 536 U.S. at 739. Florida state courts frequently rely on Eleventh Circuit Court of Appeals precedent in addressing federal law issues concerning qualified immunity. See, *e.g.*, *City of Hialeah v. Fernandez*, 661 So.2d 335, 338-41 (Fla. 3d DCA 1995).

Mr. Magyar appealed the trial court's order. (App., *infra*, 1a). In part, Mr. Magyar argued that the trial court used the wrong standard in determining "clearly established law" based on this Court's interim decision in *Hope*.

The Second District Court agreed (App., *infra*, 6a), but further determined, based upon "facts as developed by the record" (App., *infra*, 2a), that: (a) Mr. Magyar was not suspected of committing a crime (App., *infra*, 10a); (b) the Officers had violated Mr. Magyar's Fourth Amendment right to be free from excessive force because they used any force in detaining Mr. Magyar (App., *infra*, 11a); (c) Mr. Magyar's constitutional right to be free from excessive force was "sufficiently clearly established" for the officers to have had fair warning that their conduct was unlawful (App., *infra*, 12a-15a); and (d) thus, the trial court had erred in finding that the Officers were entitled to qualified immunity from suit (App., *infra*, 15a, 19a).[3] Therefore, the

[3] The Second District Court also determined that genuine issues of material fact exist as to whether each of the Officers acted "with wanton and willful disregard of Magyar's rights and safety" (App., *infra*, 15a-18c) and thus concluded that the trial court erred in granting

(Continued on following page)

Second District Court found, as a matter of law, that each of the seven Officers is not entitled to qualified immunity and must go to trial on Mr. Magyar's federal claims. (App., *infra*, 19a).

Subsequently, the Second District Court denied the Officers' motion for rehearing or clarification by order rendered August 26, 2003. (App., *infra*, 21a). The Second District Court did withdraw and stay its mandate so that the Officers could appeal its decision. (App., *infra*, 22a).

The Officers filed their petition for review with the Florida Supreme Court asking the Florida Supreme Court, in part, pursuant to its jurisdiction under Article V, Section 3(b) of the Florida Constitution, to review the Second District Court's legal conclusion that any force used against a detainee is excessive where he is not accused of committing a crime. On March 24, 2004, the Florida Supreme Court rendered its order declining to accept jurisdiction and denying the Officers' petition for review. (App., *infra*, 1c). Having exhausted state court remedies, the Officers file this Petition.

STATEMENT OF FACTS

Late in the evening of October 18, 1998, Officer Mazza and Sergeant Drees were forced to make an on-the-spot decision to detain Robert Magyar. [R. at 1089-93, 1909-12, 1952-55, 2001-02] (App., *infra*, 4b-5b). Officer Mazza

---

the Officers' motion for summary judgment as to the Plaintiffs' state law battery claims. (App., *infra*, 18a).

received a complaint from a motorist that a man was walking in the middle of the interstate highway and then observed Mr. Magyar wandering across Interstate 275 without regard for traffic. [R. at 1089-92, 1909-10, 1951, 1953-54] (App., *infra*, 2a, 4b). Mr. Magyar also told Officer Mazza that he was ill and wanted to go to the hospital. [R. at 1090, 1909] (App., *infra*, 2a, 4b). Officer Mazza later observed Mr. Magyar to be incoherent and heard him make paranoid and delusional statements. (App., *infra,* 4b). Mr. Magyar continued to make paranoid and delusional statements after Sergeant Drees arrived to assist. (App., *infra*, 2a). Officer Mazza and Sergeant Drees determined that they should detain Mr. Magyar until medical care arrived. (App., *infra*, 4b).

Initially, Mr. Magyar cooperated with Officer Mazza while he summoned an ambulance. [R at 1092-93, 1910, 2002] (App., *infra*, 2a-3a). After Sergeant Drees arrived, Officer Mazza and Sergeant Drees were able, for a time, to convince Mr. Magyar to continue to wait for the ambulance. (*Id.*). However, Mr. Magyar continued to exhibit paranoia, verbalizing his belief that the Officers wanted to hurt him and attempted to flee before the ambulance arrived. [R. at 1089-92, 1909-10, 1951, 1953-54] (App., *infra*, 4b-5b). In response, Officer Mazza and Sergeant Drees tried to physically restrain him by each grabbing one of Mr. Magyar's arms. [R. at 1092-93, 1911, 2002] (App., *infra*, 5b). As Mr. Magyar forcefully resisted, Officer Mazza called for back-up assistance. [R. at 1093, 1911, 2002] (App., *infra*, 5b).

Ultimately, Officers Womack, Douds, Trigo, Gomez and Petry arrived and assisted in subduing Mr. Magyar. [R. at 1096, 1912, 2002] (App., *infra*, 5b). The Officers used physical force by applying pressure point pain compliance

techniques to restrain Mr. Magyar and compel him to release his arms. (App., *infra*, 6b). At no time did any of the Officers use any weapons or pepper spray against Mr. Magyar. (*Id.*). Mr. Magyar continued struggling and kicking his feet. (*Id.*). When Mr. Magyar was finally handcuffed with his legs restrained by ropes, he was rolled over and appeared to be unconscious. [R. at 1097, 1912] (App., *infra*, 6b). At approximately that time, paramedics arrived and began attending to Mr. Magyar, who was intubated, re-handcuffed to a stretcher and placed in an ambulance for transport to the hospital. [R. at 1096, 1912] (App., *infra*, 5b). During the ambulance ride, Mr. Magyar regained consciousness, yelled at the paramedics and began kicking. (App., *infra*, 6b). As Magyar continued to fight, paramedics tried to hold him down using a towel over his shoulders and collar bone area. [R. at 1097, 1912] (App., *infra*, 6b). Mr. Magyar struggled all the way to the hospital. [R. at 1097, 1912] (App., *infra*, 7b). As the ambulance pulled into the hospital, Mr. Magyar collapsed and lost consciousness. [R. at 1098, 1912] (App., *infra*, 7b). The emergency room physician found that Mr. Magyar had gone into cardiac and respiratory arrest. (App., *infra*, 7b). Mr. Magyar remains in a persistent vegetative state. [R. at 1912].

REASONS FOR GRANTING THE PETITION

For the seven individual Officers involved, the events of this particular evening in October of 1998, have occupied a part of their lives for close to six (6) years. They have been individually sued, granted immunity from suit and then seen that protection taken away. All but one Officer is still an active law enforcement officer who must

continue to make split-second decisions on the streets.[4] Based on the Florida Second District Court of Appeal's decision and its failure to address a law enforcement officer's duty to take an individual into custody for involuntary examination under Florida's Mental Health Act, the Officers are currently working on the street believing they have *no* immunity if they use *any* force against an individual who, pursuant to Florida Statute section 394.463(2)(a)(2), they are required to take into custody.

More important than the seven Officers in this case, however, is the state of the law as it currently exists in the Florida Second District Court of Appeal's jurisdiction, which includes, but is not limited to, the Tampa Bay area. Even a conservative reading of the Second District Court's decision in this case warns a law enforcement officer that unless he is taking an individual into custody for the commission of a crime, he has *no* immunity if he uses *any* force to detain the individual. This holding is too broad and is in conflict with this Court's body of law regarding a law enforcement officer's qualified immunity for the use of reasonable force and that of each of the federal circuit courts of appeal as to this federal question.

Accordingly, law enforcement officers in this jurisdiction will be justified, when in doubt, to refrain from detaining a suspect for a *Terry* stop or taking anyone into custody against their physical will under Florida's Mental Health Act for fear of future legal liability.[5] This unfortunate result is the very circumstance this Court has sought

---

[4] Sergeant Drees has retired.

[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

to avoid by granting immunity from suit to law enforcement officers forced to make on-the-spot, spur-of-the-moment decisions, even if those decisions are ultimately erroneous, as long as they were objectively reasonable at the time and under the circumstances they were made. The District Court of Appeal's legal conclusion that law enforcement officers may use no force to detain an individual who is not suspected of a crime is too broad a conclusion and conflicts with clearly established law. This Court should accept jurisdiction to rectify the error and, if necessary, clarify this area of qualified immunity.

A second flaw with the District Court of Appeal's opinion is that, although the facts cited in the opinion reflect that the individual officers performed separate functions in detaining Mr. Magyar, the court's analysis treated the seven individual Officers as a single defendant in its excessive force/qualified immunity analysis. The District Court of Appeal failed to view the circumstances from the perspective of each individual law enforcement Officer as the circumstances were evolving. The Second District Court of Appeal's opinion paints with too broad a brush. Each of the Officers is entitled to his own determination as to qualified immunity for his individual actions. For this reason as well, this Court should take jurisdiction and reverse the Second District Court of Appeal's opinion.

Finally, the District Court of Appeal had at its disposal a very simple way to reverse the trial court's summary final judgment and correct any perceived errors. The interim decision by this Court in *Hope v. Pelzer,* constituted a change in the law that occurred between the time the trial court rendered its judgment and the time the appeal arrived at the Second District Court of Appeal. As the court notes in its own opinion, in such cases it would

normally remand the case with instructions to the trial court to apply the new law. (App., *infra*, 8a). Because the Second District Court failed to do so, this Court should take jurisdiction to so order even if the matter does not appear to require a written opinion from the Court. The most appropriate outcome would be to remand the entire issue of qualified immunity to the trial court to factually determine each individual Officer's entitlement to qualified immunity based on the facts presented and the change in the law.

I. THE DECISION BELOW CONFLICTS WITH THE GREATER WEIGHT OF FEDERAL LAW HOLDING THAT A LAW ENFORCEMENT OFFICER MAY LAWFULLY SEIZE A PERSON, ALTHOUGH THAT PERSON HAS NOT COMMITTED A CRIME, IF THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE PERSON IS A DANGER TO HIMSELF OR OTHERS.

This Court has instructed that when deciding whether an officer is entitled to qualified immunity, a court must first determine whether the officer's alleged conduct violated a constitutional right. *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). As the Court held in *Graham v. Connor*, "claims of excessive force in the context of arrests *or investigative stops* should be analyzed under the Fourth Amendment's 'objective reasonableness standard'[.]" *Graham*, 490 U.S. 386, 388 (1989) (emphasis added). Because a portion of the *Graham* analysis requires a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing

government interests at stake," it is the responsibility of the court, in determining an officer's entitlement to qualified immunity, to break down the *Saucier* qualified immunity analysis sequentially by: (1) first analyzing the constitutionality of the detention, and then (2) the reasonableness of the force used during the detainment. See *Saucier*, 533 U.S. at 208-09 (applying the objective reasonableness standard first to determine whether the officers had probable cause to detain Katz and whether, if they were mistaken, that Katz's right to be free from detention was clearly established. Next determining whether the force used by the officers violated Katz's right to be free from excessive force and finding that even if Katz's Fourth Amendment right was violated, the law was not so clearly established in the specific factual area so as to have put the officers on notice, finding the officers entitled to immunity).

Although *Saucier* is cited within its opinion, the sequential analysis dictated by *Saucier* was not applied by the Second District Court of Appeal. (App., *infra*, 6a-7a). The Second District entirely skipped any meaningful analysis of whether Officer Mazza and Sergeant Drees had probable cause to detain Mr. Magyar under Florida's Mental Health Law. Instead, the court found that the force used by all seven Officers together was unreasonable, for the most part, because Mr. Magyar had committed no crime. (App., *infra*, 10a-11a).

Clearly established federal law has recognized the proposition that the seizure of a mentally ill person, or one who is viewed as a danger to himself and others, is analogous to a criminal arrest and therefore should be analyzed for constitutional purposes using the Fourth Amendment probable cause standard. *Linbrugger v. Abercia*, 363 F.3d

537, 541 (5th Cir. 2004); *Anthony v. City of N.Y.*, 339 F.3d 129, 136-38 (2nd Cir. 2003); *Doby v. DeCrescenzo*, 171 F.3d 858, 871 (3rd Cir. 1999); *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997); *District of Columbia v. Evans*, 644 A.2d 1008, 1015-17 (D.C. 1994); *Glass v. Mayas*, 984 F.2d 55, 58 (2nd Cir. 1993); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 401 (7th Cir. 1993); *Gooden v. Howard County*, 954 F.2d 960, 967-68 (4th Cir. 1992) (*en banc*); *Villanova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992); *Maag v. Wessler*, 960 F.2d 773, 775-76 (9th Cir. 1991); *Le Savage v. White*, 755 F.2d 814, 821 (11th Cir. 1985) (law enforcement officer was immune from liability for taking individual into custody under Florida's Mental Health Law where he had probable cause to believe detainee could be dangerous to herself or others); *Harris v. Pirch*, 677 F.2d 681, 686 (8th Cir. 1982). Therefore, the fundamental inquiry under the Fourth Amendment is whether a law enforcement officer seizing and detaining a person for involuntary commitment or psychiatric evaluation has probable cause to believe that the person was substantially likely to pose a danger to himself or others. *Monday*, 118 F.3d at 1102; Fla. Stat. § 394.463(2)(a)(2).

Although this Court has not directly addressed the constitutionality of the seizure of an individual who is believed to be mentally ill or incapacitated, it has acknowledged that an official may act without obtaining a warrant, "in exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 719 (1986) (concluding that a public employer's warrantless search of employee's office did not violate employee's constitutional rights). Many federal authorities have relied upon this

special needs doctrine to permit officials to act without a warrant to seize an individual deemed to be mentally ill for involuntary examination. See, *e.g.*, *Doby*, 171 F.3d at 871.

The trial court, in its final judgment, expressly found under the facts of this case that "a reasonable officer could believe that he had a duty to take Mr. Magyar into custody, thus the detainment was justified under Fla. Stat. § 394.463(2)(a)(2) and not violative of any constitutional right." (App., *infra*, 5b). On appeal, the Second District Court failed to directly address this pivotal conclusion, collapsed the *Saucier* analysis and proceeded to find the use of *any* force by law enforcement in these circumstances was excessive. (App., *infra*, 10a-11a).

The Second District indirectly acknowledged Officer Mazza's and Sergeant Drees' decision to take Mr. Magyar into custody, but failed to apply the objective reasonableness standard from the perspective of the law enforcement officer in the field, making spontaneous decisions as events rapidly unfold. (App., *infra*, 10a). Rather than applying a probable cause analysis, the District Court of Appeal second-guessed the Officers' decision in light of 20/20 hindsight and found their fear that Mr. Magyar might hurt himself or others was too speculative. (*Id.*). Because the District Court of Appeal failed to correctly apply the *Saucier* analysis and failed to directly address whether Officer Mazza and Sergeant Drees had probable cause to detain Mr. Magyar, the balance of that court's application of the *Graham* test is undeniably and irreconcilably skewed against a finding of qualified immunity for any of the Officers. (App., *infra*, 10a):

> First, Magyar was not suspected of committing any crime. At the most, he had committed an infraction that would subject him to a civil citation but not detention. At the least, he was simply waiting for an ambulance to arrive. **When no crime has been committed, this fact weighs heavily in favor of finding the use of force excessive.** Because serious force is appropriate for a more serious crime and less force is appropriate for a less serious offense (citation omitted), **the fact that Magyar had committed no offense at all militates against the use of *any force*** – much less the force used in this case to effect Magyar's detention. That Magyar was a "big guy," a fact which was repeatedly stressed at oral argument, is irrelevant because **the use of force was improper *ab initio*.**

(emphasis added).[6]

The District Court of Appeal did concede that Mr. Magyar had probably violated traffic control laws that

---

[6] In its opinion, the Florida Second District Court of Appeal also misreads the holding by this Court in *Graham v. Connor*. The District Court stated "[t]he Supreme Court found that the force used by officers in *Graham* was arguably excessive under the circumstances presented, particularly because the officers were aware of Graham's medical condition but chose to ignore it." (App., *infra*, 13a). A close reading of the Court's holding in *Graham*, however, reflects that the Court decided what constitutional standard and test govern excessive force claims. The *Graham* Court, after determining that the Fourth Amendment standard must be applied to all excessive force claims and describing the balancing test required to determine such claims, vacated the Court of Appeal's decision because it had been based on the District Court's erroneous view of the governing law and remanded the case to that Court of Appeal with instructions to reconsider the issue under the proper Fourth Amendment standard. *Graham*, 490 U.S. at 394-99.

would subject him to a civil penalty. See Fla. Stat. § 316.130(4), (8), (12) & (14). (App., *infra*, 10a). The District Court of Appeal, however, failed to further address the Florida Statute that authorizes a Florida law enforcement officer to arrest an individual he witnesses violating the statute in his presence. Fla. Stat. § 901.15(5); see also, *Durruthy v. Pastor*, 351 F.3d 1080, 1089 (11th Cir. 2003) (concluding that a law enforcement officer who arrested a member of the press she witnessed walking in the middle of a cleared street during a protest did not violate that individual's constitutional rights because, "[u]nder Florida law, a law enforcement officer may arrest a person without a warrant if '[a] violation of chapter 316 is committed in the officer's presence'[.]"). Consequently, another reason that Mr. Magyar's constitutional right to be free from illegal seizure was not violated is because Officer Mazza had statutory authority to arrest Mr. Magyar after he saw him walking in the middle of the highway. *Durruthy*, 351 F.3d at 1089-90.

Because the Second District Court of Appeal's opinion misapplies the Court's tests as set forth in both *Saucier* and *Graham* and conflicts with the greater weight of federal law on the issue of analyzing law enforcement seizures for involuntary commitment, this Court should accept jurisdiction to correct the error. The Officers respectfully request the Court address whether the Fourth Amendment's probable cause standard applies when law enforcement officers encounter and find it necessary to detain a person who is likely to hurt himself or others.

II. THE DECISION BELOW CONFLICTS WITH CLEARLY ESTABLISHED LAW REQUIRING A COURT TO SEPARATELY ANALYZE EACH OFFICER'S ACTIONS IN DETERMINING THAT OFFICER'S ENTITLEMENT TO QUALIFIED IMMUNITY.

It is clearly established that, in applying the *Saucier* qualified immunity test, a court must separately analyze each officer's actions to determine whether that individual officer violated one of the claimant's constitutional rights and, if so, whether that right was clearly established at the time. *Saucier*, 533 U.S. at 211-12 (J. Ginsburg concurring) (concluding that Officer Saucier was entitled to qualified immunity from Katz's claim because Katz had failed to bring forward enough proof to show that it was Officer Saucier who shoved him and thus allegedly violated Katz's constitutional rights, as opposed to Officer Parker, another officer involved in the arrest whom Katz did not sue). "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier*, 533 U.S. at 200. It therefore stands to reason that each individual officer is entitled to a separate analysis of his own entitlement to that immunity.

The trial court correctly made individual factual findings as to the actions of Officer Mazza and Sergeant Drees in detaining Mr. Magyar. (App., *infra*, 4b-5b). As noted above, the trial court concluded that Officer Mazza and Sergeant Drees did not violate Mr. Magyar's constitutional right to be free from unreasonable seizure by detaining him. (App., *infra*, 5b). The trial court next determined, (prior to this Court's decision in *Hope v. Pelzer*), that the undisputed material facts failed to establish that any of the officers violated clearly established law

in applying the force they used to detain Mr. Magyar because all cases cited by Mr. Magyar were "materially different" from the facts of this case. (App., *infra*, 5b-7b). Accordingly, the trial court found that each of the Officers was entitled to qualified immunity. (App., *infra*, 7b). In making this second conclusion, the trial court made certain factual findings, but evidently determined it need not make further officer-specific findings because no "materially similar" law was presented by Mr. Magyar to overcome the Officers' presumed entitlement to qualified immunity. (App., *infra*, 5b-7b).

The District Court of Appeal's opinion detailed the acts of some of the Officers based on its independent review of the record and then concluded that each and every one of the Officers should be denied qualified immunity based on the facts it recited as applied to the law. (App., *infra*, 2a-3a, 10a-11a). In its opinion, the District Court of Appeal failed to specify exactly what, if any, actions Officers Kevin J. Petry and/or Charles A. Trigo took that violated Mr. Magyar's clearly established constitutional rights. (*Id.*). Further, the District Court of Appeal's description of Officer Victor M. Gomez's actions was so brief, and the actions described so minor, that it is impossible to understand what action attributable to Officer Gomez prevented him from being entitled to qualified immunity. (App., *infra*, 4a).

More important, the District Court of Appeal failed to apply the "objective reasonableness" test attributable to any of the individual Officers' actions, from their unique perspectives, prior to stripping each of them of qualified

immunity. (App., *infra*, 10a-15a).[7] Accordingly, the Florida Second District Court of Appeal's application of the *Saucier* and *Graham* tests in determining, as a matter of law, the issue of qualified immunity as to alleged illegal seizure and excessive force was flawed. *Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed"); *Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight. . . . [.] The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.").

The trial court relied on the Eleventh Circuit's "materially similar" standard in granting the Officers' motion for summary judgment based on qualified immunity. (App., *infra*, 5b-7b). A month after the trial court rendered its judgment, this Court's decision in *Hope v. Pelzer*, was released. The District Court of Appeal acknowledged the trial court's error based on the interim clarification of the law in *Hope*, and stated "[u]sually when a trial court applies the incorrect standard, we reverse and remand for a new hearing at which the trial court must reconsider its decision in light of the proper legal standard." (App., *infra*,

[7] There was no cause of action for conspiracy under the federal civil rights statute pled in this case. Accordingly, each officer was sued individually under 42 U.S.C. § 1983.

8a). Had the District Court of Appeal followed its usual procedure, the trial court would have had the opportunity to correct its error and further develop the record as to the individual Officers' actions, if necessary. Unfortunately, the District Court of Appeal determined "because it was clear from the record that the individual officers are not entitled to qualified immunity as a matter of law at this stage of the proceedings, we simply reverse on this issue." (*Id.*). Although the District Court of Appeal concluded it was clear from the record that the individual Officers are not entitled to qualified immunity, the court's opinion fails to specify what portions of the record it relies upon in coming to that conclusion. Further, it comes to this conclusion without analyzing the individual Officer's separate actions. For this reason, the Officers respectfully request that this Court accept jurisdiction to correct this error either (1) by remanding the case to the trial court for correction of its analysis in light of *Hope*, or (2) by addressing the Florida Second District Court of Appeal's error and remanding the case to the appellate court to correct the errors.

CONCLUSION

The Court should grant the Officers' petition for a writ of certiorari and reverse the decision of the Florida Second District Court of Appeal.

Respectfully submitted,

DONALD A. SMITH, JR., ESQUIRE
ANNE CAVANAUGH JONES, ESQUIRE
SMITH & TOZIAN, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
Telephone: (813) 273-0063
Facsimile: (813) 221-8832
Counsel for the Petitioner-Officers

APPENDIX A

852 So.2d 299

District Court of Appeal of Florida,
Second District.

Jeannette THOMPSON, as Plenary Guardian
of Robert Magyar, and Cecilia Magyar,
individually, Appellants,
v.
Jarrod S. DOUDS, Franklin M. Drees,
Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry,
Charles A. Trigo, and John Womack, Appellees.

No. 2D02-3972.

July 18, 2003.
Rehearing Denied Aug. 26, 2003.

Michael J. Bradford, Rebecca O'Dell Townsend, Garry J. Rhoden, Daniel P. Mitchell, and Christine A. Marlewski of Gray, Harris & Robinson, P.A., Tampa, for Appellants.

Donald S. Smith, Jr., and Gwendolyn R. Hollstrom of Smith & Tozian, P.A., Tampa, for Appellees.

VILLANTI, Judge.

Jeannette Thompson, as plenary guardian of Robert Magyar, and Cecilia Magyar, individually (collectively "Thompson"), challenge the trial court's order granting final summary judgment in favor of defendants, Jarrod S. Douds, Franklin M. Drees, Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo, and John Womack (collectively "the individual officers") in this excessive force case. Because the trial court applied the incorrect legal standard in granting summary judgment on Thompson's constitutional law claim and because fact questions

preclude summary judgment on the state law battery claim, we reverse.

FACTUAL BACKGROUND

Each of the individual defendants is a police officer with the City of Tampa Police Department. The facts as developed by the record show that on October 18, 1998, at around 11 p.m., Officer Salvatore Mazza received a report that a man was walking on the interstate. Mazza drove onto the interstate, where he found Robert Magyar crossing traffic. Mazza became concerned because Magyar did not appear to be aware of the traffic around him. Therefore, Mazza made contact with Magyar. Magyar told Mazza that he had diabetes and high blood pressure, that he was not feeling well, and that he was walking to the hospital. Mazza persuaded Magyar to get into his patrol car so that he could drive him off the interstate and summon an ambulance.

Mazza took Magyar to an abandoned gas station that was a local meeting place for the police and called for an ambulance. While the two were waiting for the ambulance to arrive, Magyar began to make statements which indicated that he believed Mazza wanted to hurt him. Mazza tried to help Magyar remain calm and repeatedly assured Magyar that he was not going to hurt him. At some point, Magyar indicated that he felt ill, and Mazza let him out of the patrol car to get some air. Magyar sat down on one of the pump islands. While Magyar did not try to leave at that point, he continued to make statements to the effect that Mazza was trying to hurt him.

When the ambulance failed to arrive promptly, Mazza made a second call for the ambulance. Sergeant Franklin

Drees heard the call and drove to the abandoned gas station to assist Mazza. When he arrived, Magyar was still sitting on the same pump island. As Drees and Mazza talked, Magyar continued to make statements about the officers wanting to hurt him. Finally, Magyar got up and started to walk away. Mazza ordered him to stop, and Magyar returned to the same pump island. However, a short time later, Magyar got up again and began to walk away. This time, Magyar ignored Mazza's command to stop and, instead, began to walk faster.

Mazza and Drees then chased Magyar down and grabbed his arms. Magyar began to struggle against the officers, saying that he had not done anything and that he wanted to go home.[1] Drees then began doing "leg sweeps" in an effort to get Magyar to the ground. Ultimately, Magyar fell to his hands and knees. Mazza and Drees continued to struggle with him, and they were eventually able to get Magyar face down on the ground. When Magyar continued to struggle, Mazza called for backup. Mazza testified in an internal affairs interview and in his deposition that he was "on top" of Magyar during this struggle.[2] Drees testified in his internal affairs interview that he was

---

[1] The record shows that Magyar's home was approximately three blocks from the abandoned gas station where this incident occurred.

[2] At oral argument, counsel for the individual officers insisted that the internal affairs interview transcripts were not record evidence. However, these transcripts were attached to requests for admissions served on the individual officers in June 2000, and each officer admitted in August 2000 in response to these requests that the interview transcripts were authentic, were public records, and contained statements actually made by the officers. Therefore, these interview transcripts are, in fact, record evidence that was before the trial court when the ruling on the summary judgment motion was made.

lying on the back side of Magyar's right shoulder, using his body weight to keep Magyar down. Officer Victor Gomez, who arrived in response to the call for backup, testified in his internal affairs interview that both Mazza and Drees were lying on top of Magyar when he arrived at the scene. Gomez then lay across Magyar's legs. Officer Kevin Petry, who also responded to the backup call, testified in his internal affairs interview that Mazza and Drees were "on top of the white male" when he arrived. Officer Jarrod Douds testified in his internal affairs interview that when he arrived, Drees was lying on Magyar's right shoulder, and Douds stepped in and pinned Magyar's left shoulder. Douds also held Magyar's head to keep him from thrashing. Officer John Womack testified in his internal affairs interview that when he arrived at the scene, he could not see Magyar because Mazza and Drees were on top of him. Womack testified to using two or three "knee blasts" on Magyar to get his legs down. In addition, Douds testified to using two different "pain compliance techniques" on Magyar's back in an effort to force Magyar to release his hands so they could be handcuffed.

This use of force did not stop once Magyar was handcuffed. Petry testified in his internal affairs interview that several officers continued to physically hold Magyar down after he was handcuffed and after his legs were bound with rope. Mazza testified that he sat on top of Magyar's legs to keep him from rolling even after Magyar was already handcuffed and bound. Douds testified that he and Drees continued to lie across Magyar's shoulders after he was handcuffed until he "went limp." When the officers rolled Magyar over after he went limp, Magyar was not breathing, he was unresponsive, and his lips were blue. Several officers testified to seeing abrasions on Magyar's

face and blood coming from his nose when Magyar was first rolled over. While Magyar regained some level of consciousness in the ambulance, he was in total cardiac and respiratory arrest when he arrived at the hospital. Magyar has been in a persistent vegetative state since the night of the incident.

In their depositions, the individual officers gave accounts of their activities on the night in question that differed drastically from their internal affairs interviews. While the officers admitted at deposition that they used knee blasts and other pain compliance techniques to subdue Magyar, all of them denied ever sitting on Magyar or using their body weight to restrain him. All of the officers denied seeing any injuries to Magyar's face when he was rolled over. Further, all of the officers denied using any force on Magyar once he was handcuffed and bound with rope. The officers offered no plausible explanation for the severity of Magyar's injuries, variously attributing them to Magyar's own actions in the ambulance, the actions of the paramedics in intubating Magyar, or the actions of the physicians in the emergency room in resuscitating Magyar.

In Thompson's amended complaint, she asserted a claim against the individual officers pursuant to 42 U.S.C. § 1983 for violation of Robert Magyar's constitutional rights and a claim under state law for battery.[3] In response to the section 1983 claim, the individual officers asserted

---

[3] The complaint also asserted various causes of action against the City of Tampa. These counts were not affected by the summary judgment in favor of the individual officers and remain pending in the trial court.

that they were entitled to qualified immunity. In response to the battery claim, the officers asserted that they were entitled to statutory immunity under section 768.28(9), Florida Statutes (1997). After significant discovery, the individual officers moved for summary judgment based on these affirmative defenses. The trial court granted final summary judgment in favor of the officers as a group, finding as a matter of law that their actions were reasonable. The trial court made no findings of fact relating to the reasonableness of any individual officer's conduct. It is this final summary judgment that Thompson challenges in this appeal.

SECTION 1983 CLAIM

Thompson first contends that the trial court erred in granting summary judgment in favor of the individual officers on the basis of qualified immunity. Thompson contends that the trial court used the improper legal standard when determining the qualified immunity issue. She also contends that even if the correct standard was used, summary judgment was inappropriate under the facts of this case. We agree.

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). It is an immunity from suit rather than a defense to liability. *Saucier v. Katz,* 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Thus, entitlement to qualified immunity is generally a question of law for the court rather than a question of fact for a jury.

There are two questions that must be answered in order to determine whether a particular defendant is

entitled to qualified immunity. First, taking all of the facts in the light most favorable to the plaintiff, the court must determine whether the facts as alleged demonstrate a violation of a constitutional right. *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. Second, assuming a constitutional right was violated, the court must determine whether that constitutional right was "clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

In granting the individual officers summary judgment on the qualified immunity issue, the trial court found that the cases cited by Thompson in opposition to the motion had facts "materially different from the facts herein." Therefore, the trial court found that Thompson had failed to prove that the law was "clearly established." However, as the Supreme Court recently held, whether cases exist with materially similar facts is not the dispositive legal inquiry. In *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), the Supreme Court specifically rejected any requirement that the facts of previous cases be materially similar to those of the case before the Court. The Supreme Court noted that prior federal circuit court precedent had so held, but the Court stated that such holdings were "not consistent with our cases." *Id.*

> As we have explained, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz,* 533 U.S., at 206, 121 S.Ct. 2151, 150 L.Ed.2d 272. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that

> right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, *see Mitchell* [*v. Forsyth*, 472 U.S. 511,] 535, [sic] n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

Hope, 536 U.S. at 739, 122 S.Ct. 2508. Thus, the salient question for the court is whether the law in place at the time of the incident gave the officers fair warning that their treatment of the plaintiff was unconstitutional. *Id.* at 741, 122 S.Ct. 2508.

To be fair, the *Hope* decision was released one month after the trial court granted the individual officers summary judgment in this case. However, as the *Hope* case specifically points out, the decision is based on prior precedent from the Supreme Court. Therefore, the trial court applied the incorrect legal standard when it granted the individual officers' motion for final summary judgment based solely on the lack of a materially similar case. Usually when a trial court applies the incorrect legal standard, we reverse and remand for a new hearing at which the trial court must reconsider its decision in light of the proper legal standard. However, because it is clear from the record that the individual officers are not entitled to qualified immunity as a matter of law at this stage of the proceedings, we simply reverse on this issue.

In applying the correct legal standard, the first inquiry in determining whether a government official is entitled to qualified immunity as a matter of law is whether the facts as alleged by the plaintiff show that the

official violated a constitutional right. In making this decision, the trial court must consider all of the facts alleged in the light most favorable to the plaintiff and must determine whether those facts state a constitutional violation. *Johnson v. Jones,* 515 U.S. 304, 311, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Lee v. Ferraro,* 284 F.3d 1188, 1190 (11th Cir.2002); *Cottrell v. Caldwell,* 85 F.3d 1480, 1486 (11th Cir.1996). It is immaterial whether the defendant offers a different version of the facts. *Lee,* 284 F.3d at 1190.

When a plaintiff alleges a violation of the Fourth Amendment, the question is whether the search or seizure was effected with reasonable force. Determining whether the force used in a particular seizure was reasonable requires consideration of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (quoting *Tennessee v. Garner,* 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). In balancing these interests, the court must consider "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The force used must be reasonably proportionate to the need for that force, *see id.,* and the question is whether the totality of the circumstances justifies the particular sort of seizure. *Garner,* 471 U.S. at 8-9, 105 S.Ct. 1694. Moreover, the reasonableness test is an objective one. *Graham,* 490 U.S. at 397, 109 S.Ct. 1865. Thus, while "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force," neither will "an officer's

good intentions make an objectively unreasonable use of force constitutional." *Id.*

In this case, the officers' laudable intentions are not questioned. Rather, the only question is whether the force used to effectuate these intentions was excessive. Our review of the record shows that the use of force was objectively unreasonable based on the information the individual officers had. First, Magyar was not suspected of committing any crime. At the most, he had committed an infraction that would subject him to a civil citation but not detention. At the least, he was simply waiting voluntarily with the police for an ambulance to arrive. When no crime has been committed, this fact weighs heavily in favor of finding the use of force excessive. Because serious force is appropriate for a more serious crime and less force is appropriate for a less serious offense, *see Lee,* 284 F.3d at 1198, the fact that Magyar had committed no offense at all militates against the use of any force – much less the force used in this case to effect Magyar's detention. That Magyar was a "big guy," a fact which was repeatedly stressed at oral argument, is irrelevant because the use of force was improper ab initio.

Second, taking the evidence in the light most favorable to Thompson, Magyar did not pose an immediate threat to either the officers or others. Clearly, when Magyar walked quickly away from the officers, he posed absolutely no threat to them. Further, there is no evidence that Magyar posed any immediate threat to others. While the individual officers asserted that Magyar *might* have been heading back onto the interstate where he *might* have caused an accident which *might* have injured others, this chain of speculation does not establish that Magyar posed an *immediate* threat to either others or himself.

Further, the individual officers' assertion that Magyar's health might have resulted in him falling into a diabetic coma on the side of the road cannot change the fact that their use of force was unreasonable. As noted in *Graham,* the officers' good intentions cannot make the use of unreasonable force constitutional.

Third, while there is evidence to show that Magyar was resisting the officers' efforts to detain him, this fact simply does not warrant the amount of force used in this case. The evidence shows that the officers continued to exert force against Magyar even after he was handcuffed and after his legs were bound with rope. The use of the officers' body weight to prevent Magyar from rolling when he was already handcuffed and bound was simply not necessary to effect his detention or to prevent harm to the officers or others. Taking the facts in the light most favorable to Thompson and balancing the three considerations set forth in *Graham* demonstrates that the individual officers used unreasonable force in detaining Magyar. Therefore, the facts as alleged support a finding that the individual officers violated Magyar's Fourth Amendment rights.

Having established that the facts alleged show a violation of the Fourth Amendment, this court must consider whether that constitutional right was clearly established. The question is whether the individual officers should have known based on the state of the law at the time of the incident that their actions violated Magyar's Fourth Amendment rights. This does not mean that the individual officers had to know of an actual case on point. Rather, the question is whether the individual officers had fair warning that their treatment of Magyar was unconstitutional. *See Hope,* 536 U.S. at 741, 122 S.Ct.

2508. Here, the law at the time of the incident was sufficiently clear to give the individual officers fair warning that their actions violated Magyar's constitutional rights.

While no materially similar case is required, the facts in *Graham* are sufficiently similar to show that the law on this issue was clearly established. In *Graham,* Graham, who was diabetic, began to suffer from an insulin reaction. *Graham,* 490 U.S. at 388, 109 S.Ct. 1865. He asked a friend to drive him to a convenience store to buy juice; however, when they got to the store, the line was very long. *Id.* Therefore, Graham hurried out of the store and asked his friend to drive him to a friend's house instead. *Id.* at 389, 109 S.Ct. 1865. A police officer saw Graham walk hastily in and out of the store and became suspicious that something had happened. *Id.* Therefore, the officer stopped Graham's car and ordered Graham to wait while he found out what, if anything, had happened in the store. *Id.* When Graham explained that he was suffering an insulin reaction, the officer called for assistance, but he refused to allow Graham to obtain juice. *Id.* Graham then got out of the car, ran around it twice, and passed out. *Id.*

When backup officers arrived, they rolled Graham over and handcuffed his hands tightly behind his back. *Id.* Several officers then lifted Graham up by his arms, carried him to the car, and laid him face down on the hood. *Id.* The officers later threw Graham headfirst into the back seat of a police car. *Id.* The officers refused Graham's repeated requests for juice or sugar, as well as his request that they look in his wallet to see his diabetic decal. *Id.* At some point during this encounter, Graham suffered a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder. *Id.* at 390, 109 S.Ct. 1865. Ultimately, the police learned that nothing had happened at the convenience

store, and they released Graham without charging him. *Id.* at 389, 109 S.Ct. 1865. Based on these facts, the Supreme Court held that the officers were not entitled to qualified immunity as a matter of law. It therefore remanded the case for further consideration.

In this case, Magyar, like Graham, was suffering from an insulin reaction. Unlike Graham, however, Magyar was not even suspected of having committed a crime. The Supreme Court found that the force used by the officers in *Graham* was arguably excessive under the circumstances presented, particularly because the officers were aware of Graham's medical condition but chose to ignore it. Given that the force used in Magyar's case was more extreme than that used in *Graham* in a situation that was much less compelling and given that *Graham* had been on the books for nine years before the incident with Magyar, the individual officers in this case had fair warning that their conduct was unlawful. This is particularly true because *Graham* held that the proportionality between the force used and the crime committed was the most important factor in determining excessiveness.

Further, there were at least two federal circuit court cases issued before the incident involving Magyar that held that the level of force used by the individual officers in this case was improper when the victim was not suspected of committing a crime. In *Thornton v. City of Macon,* 132 F.3d 1395, 1397-98 (11th Cir.1998), two officers were providing assistance to a woman who was trying to collect her belongings from her former boyfriend's home. The police originally saw the boyfriend, Thornton, on the porch of his home. *Id.* at 1398. When the officer approached Thornton and told him why he was there, Thornton responded by saying that he had done nothing wrong,

and he asked the officer to leave. *Id.* Rather than leaving, the officer called for backup. *Id.* Thornton then went inside and shut the door. *Id.* The officers then tried unsuccessfully to get Thornton to come out of the house. *Id.* Ultimately, when Thornton opened the door, the officers charged into the apartment, grabbed his arms, threw him to the floor, cuffed his hands behind his back, dragged him outside, and shoved him into a police car. *Id.* When a friend tried to assist Thornton, the officers slammed the friend onto the hood of the police car and handcuffed him. *Id.* In denying qualified immunity to the officers, the court noted that because neither Thornton nor his friend were suspected of any crime and because they posed no threat to anyone, the officers were not justified in using any force to arrest them, and a reasonable officer would have recognized the force used as excessive. *Id.* at 1400.

Similarly, in *Spann v. Rainey,* 987 F.2d 1110, 1112 (5th Cir.1993), officers were called to a doctor's office when Spann arrived and allegedly began causing a "disturbance." When the officers arrived, they were directed to Spann. When the officers asked for Spann's identification, he did not respond. At that point, Officer Rainey grabbed Spann's arm, and Spann then "lunged forward, grabbing Officer Kendrick in the neck/collarbone area." *Id.* Officer Rainey then hit Spann over the head with a flashlight, causing Spann to fall. *Id.* When Spann attempted to get up, Officer Rainey hit him again. *Id.* Spann alleged that he was then kicked, stomped, beaten, handcuffed, and dragged down the stairs. *Id.*

In denying qualified immunity to Officer Rainey, the court stated:

> [W]e cannot conclude that a reasonable police officer would think the extent of force allegedly used was necessary under the circumstances. It is uncontested that the only charge ultimately filed against Spann was resisting arrest. He contends that he was not being arrested for any underlying crime and that no warrant for his arrest was outstanding. He further contends that he "was not violating any laws, was not attempting to interfere with any defendants' execution of duties, and was not engaged in assaulting, threatening . . . behavior toward the . . . officers . . . or any other citizen."

Id. at 1116. Because the level of force used was not reasonable under the circumstances, Officer Rainey was not entitled to summary judgment on the issue of qualified immunity. *Id.*

In both *Thornton* and *Spann,* as in this case, the plaintiffs were not suspected of committing any crime. The case law clearly held that the level of permissible force is very low when there is not even a suspicion that a crime was committed. *Spann* was decided in 1993. *Thornton* was decided nine months before the incident involving Magyar. These cases provided fair warning to the individual officers in this case that the level of force they used with Magyar was unlawful.

Because the facts as alleged by Thompson show the violation of a constitutional right and because that right was sufficiently clearly established for the individual officers to have fair warning that their conduct was unlawful, the trial court erred in granting final summary judgment in favor of the individual officers on this issue.

STATE LAW BATTERY CLAIM

Thompson next contends that the trial court erred in granting final summary judgment in favor of the individual officers on the state law battery claim. We agree.

The parties do not dispute that the sovereign immunity statute, section 768.28(9)(a), Florida Statutes (1997), generally protects government officials from individual liability for damages. However, an exception to this statutory immunity applies when the governmental official "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a). Here, while there is no evidence that the individual officers acted in bad faith or with a malicious purpose, there is a genuine issue of material fact as to whether the individual officers' actions constituted a wanton and willful disregard of human rights. Therefore, the trial court erred in granting final summary judgment on this basis.

There are two facts that are most telling on this issue. First, the level of force applied to Magyar by the officers arriving at the scene in response to the call for backup arguably shows a wanton and willful disregard for human rights. When Womack arrived at the scene, he gave Magyar two or three "knee blasts" without having any idea of why the officers were struggling with Magyar. Similarly, Douds used two "pain compliance techniques" on Magyar's back without having any idea of the reason for the struggle. Drees testified in his deposition that he told the backup officers as they approached that they were not to hurt Magyar because they were only trying to get him to the hospital. Clearly, if the officers heard and ignored

Drees' warning, their actions constituted a wanton and willful disregard for human rights.

Second, several officers continued to hold Magyar down with their body weight after Magyar was handcuffed and bound with ropes. Douds testified in his internal affairs interview that he and Drees continued to use their body weight across Magyar's shoulders after Magyar was handcuffed and that they did not let up until Magyar "went limp." Mazza testified that he lay across Magyar's legs after Magyar was handcuffed and bound to keep Magyar from rolling. Clearly, having at least three officers use their full body weight to hold down a handcuffed and bound suspect raises a question as to whether their actions constituted a wanton and willful disregard for human rights and safety.

The individual officers assert in their brief that there is no evidence that they engaged in any of this behavior, relying solely on their deposition testimony. While many of these facts are not included in their deposition testimony, these facts are documented in the transcripts of their internal affairs interviews. Standing alone, the fact that the substance of the internal affairs interviews conflicts with the substance of the officers' deposition testimony raises a genuine issue of material fact on the issue of the force used as well as on the issue of the officers' credibility.

The individual officers also argue that there can be no genuine issue of material fact because their testimony is unrefuted. They assert that Thompson cannot raise an issue of material fact because neither she nor anyone else was present to dispute the individual officers' version of events. This argument suffers from at least two deficiencies. First, the fact that there are conflicts between the

officers' internal affairs interviews and their deposition testimony raises questions concerning their credibility at deposition. Thompson is entitled to rely on these discrepancies to establish a lack of credibility and to argue that the internal affairs interviews, given the morning after the incident, are more credible than deposition testimony given two years later.

Second, there are photographs in the record that depict injuries more severe than those testified to by the individual officers. This photographic evidence, while not dispositive of any issue, is certainly sufficient to raise a question of fact as to the severity of Magyar's treatment at the hands of the individual officers.

The officers argue that these photographs may not be used to create a fact question when their testimony is otherwise undisputed, relying on *Wood v. City of Lakeland,* 203 F.3d 1288 (11th Cir.2000). However, the facts of *Wood* are distinguishable. In *Wood,* a violent, suicidal individual was barricaded in his bedroom with a knife. *Id.* at 1290. Officers arrived at the request of the family to assist in getting the individual out of the bedroom. *Id.* When the officers entered the room, the individual allegedly lunged at them with a knife. *Id.* The officers responded by shooting the individual, killing him. *Id.* The family argued that the use of force was excessive, relying on an autopsy report which allegedly showed that the angle of the bullet wounds contradicted the officers' version of events. *Id.* at 1290-91. The court, however, held that the autopsy report, standing alone, was insufficient to create an issue of material fact as to qualified immunity. *Id.* at 1291. The court noted that while the autopsy report showed that the individual's right arm was flexed and raised when the bullets passed through it into the chest, this did not

contradict the officers' version of events. *Id.* Therefore, the autopsy report was insufficient to establish a fact question that would defeat summary judgment on the issue of qualified immunity. *Id.*

In this case, unlike in *Wood,* Thompson does not rely solely on nontestimonial evidence to raise questions of fact. While the photographs do appear to conflict with the officers' testimony, they are not the only source of the dispute. Rather, the discrepancies in the officers' testimony also create issues of fact. Thus, *Wood* is not controlling in this case. Moreover, to the extent that *Wood* can be read to stand for the proposition that photographs and other nontestimonial evidence can never be used to dispute the testimony of officers present at the scene, we disagree. To ignore the photographic evidence simply because the victim is unable to give verbal testimony that refutes the officers' version of events would not serve either public policy or justice.

Because the record shows that there are genuine issues of material fact as to whether the officers acted with wanton and willful disregard of Magyar's rights and safety, the trial court's decision to grant summary judgment on the basis of statutory immunity was improper.

CONCLUSION

Based on the record as it exists, the individual officers are not entitled to either qualified immunity or statutory immunity as a matter of law. Rather, the question of whether the individual officers should be subject to liability for their actions on October 18, 1998, is one for the jury. Therefore, we reverse and remand for further proceedings on both claims.

Reversed and remanded.

NORTHCUTT and COVINGTON, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

August 26, 2003

CASE NO.: 2D02-3972
L.T. No.: 00-01147

Jeanette Thompson Et. Al. v. Jarrod S. Douds, Et. Al.

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellees' motion for rehearing or clarification is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Daniel P. Mitchell, Esq. Peter Michael Walsh, Esq.
Gwendolyn Hollstrom, Esq. Richard Ake, Clerk

bl

/s/ James Birkhold [SEAL]
James Birkhold
Clerk

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

October 22, 2003

CASE NO.: 2D02-3972
L.T. No.: 00-01147

Jeanette Thompson Et. Al. v. Jarrod S. Douds, Et. Al.

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellees' motion to withdraw and stay mandate is granted.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Daniel P. Mitchell, Esq.
Peter Michael Walsh, Esq.
Richard Ake, Clerk
Donald A. Smith, Jr., Esq.
Gwendolyn H. Hinkle, Esq.

bl

/s/ James Birkhold
James Birkhold
Clerk

[SEAL]

APPENDIX B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
GENERAL CIVIL DIVISION

JEANNETTE THOMPSON,
as Plenary Guardian of
ROBERT MAGYAR and
CECILIA MAGYAR, Individually,

Plaintiffs,

v.

CASE NO.: 00-01147
DIVISION: B

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR M. GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, and JOHN WOMACK; and THE CITY OF TAMPA, FLORIDA, A MUNICIPAL CORPORATION,

Defendants. /

FINAL JUDGMENT

Upon Motion for Summary Judgment filed on behalf of Defendant Officers Douds, Drees, Gomez, Mazza, Petry, Trigo and Womack, and the Court previously finding in its Order on Defendant Officers' Motion for Summary Judgment entered on May 22, 2002 that the Defendant Officers were entitled to summary judgment on all counts alleged against them; it is, therefore,

ADJUDGED that judgment is entered in this cause in favor of Defendant Officers Douds, Drees, Gomez, Mazza, Petry, Trigo and Womack and that Plaintiffs Jeanette Thompson, as Plenary Guardian of Robert

Magyar and Cecilia Magyar take nothing by this action and Defendant Officers shall go hence without day. [sic]

DONE AND ORDERED in Chambers, Tampa, Hillsborough County Florida this 21 day of July, 2002.

/s/ Vivian C. Maye
HONORABLE VIVIAN C. MAYE
CIRCUIT JUDGE

cc: Donald A. Smith, Jr., Esquire
109 North Brush Street
Suite 150
Tampa, FL 33602

Daniel P. Mitchell, Esquire
Garry J. Rhoden, Esquire
201 North Franklin St.
Suite 2200
P.O. Box 3324
Tampa, FL 33601-3324

Peter M. Walsh, Esquire
696 First Avenue North
Suite 304
St. Petersburg, FL 33701

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION B

Jeannette Thompson,
as Plenary Guardian of
Robert Magyar and
Cecilia Magyar, individually,
Plaintiff(s),
vs.
Jarrod S. Douds, Franklin
M. Drees, Victor M. Gomez,
Salvatore S. Mazza, Kevin J.
Petry, Charles A. Trigo, and
John Womack; and the City
of Tampa, Florida,
a Municipal Corporation,
Defendant(s). /

Case No: 00-1147

Order on Defendant Officers'
Motion for Summary Judgment

This matter came on for hearing on the Defendant Officers' Motion for Summary Judgment. The Court has considered the evidence presented and argument of counsel and finds as follows:

1. The individual officers' have moved for Summary Judgment as to Counts I and V of Plaintiff's amended complaint.

2. Defendant's allege entitlement to Summary Judgment based on qualified immunity and statutory immunity under Florida Statutes, section 768.28(9)(a).

3. A determination of qualified immunity involves a two part analysis. ***Vermette v. Ludwig,*** 707 So 2d. 742

(Fla. 2d DCA 1998) (citing ***Zeigler v. Jackson***, 716 F. 2d 847 (11th Cir. 1983)). First, the defending officer has the initial burden of showing that he was acting within the scope of his discretionary law enforcement duties. Once, the defending officers' [sic] have met their burden of showing that they were acting within their discretionary duties, the burden shifts to the Plaintiff to prove that the officers' actions violated clearly established statutory or constitutional rights.

4. The individual defendant officers have met their initial burden. They were duly appointed and acting law enforcement officers and were acting under color of law and within the course and scope of their employment as municipal police officers.

5. The following facts are undisputed:

   a. Officer Mazza sees a vehicle narrowly miss Mr. Magyar while Mr. Magyar is walking on Interstate 275.

   b. Mr. Magyar did not vary his pace when the vehicle narrowly missed him.

   c. Mr. Magyar tells Officer Mazza that he is walking to the hospital and that he has high blood sugar and high blood pressure.

   d. Mr. Magyar later makes delusional statements that the officer is trying to kill him and people are following him and taking pictures.

   e. Officer Mazza called for an ambulance to take Mr. Magyar to the hospital emergency room.

   f. Both Officer Mazza and Sergeant Drees testified in depositions and interrogatory answers that they were taking him into custody because

they were concerned that there was a substantial likelihood that he could cause serious bodily harm to himself.

7. Under these facts a reasonable officer could believe that he had a duty to take Mr. Magyar into custody, thus the detainment was justified under Fla Stat. 394.463 (2)(a)(2) and not violative of any constitutional right.

8. The following facts are also undisputed:

a. Mr. Magyar began walking away from officers Mazza and Drees and began walking back toward the interstate.

b. He returned after the officers ordered him back.

c. Thereafter, he again got up and began walking toward the interstate, and ignored the officers [sic] orders to return.

d. Officer Mazza and Sergeant Drees attempted to physically restrain Mr. Magyar.

e. Each officer grabbed one of Mr. Magyar's arms.

f. Mr. Magyar begain [sic] waving his arms, resisting the officers.

g. Officer Mazza called for emergency back-up.

h. Sergeant Drees and Officers [sic] Mazza forced Mr. Magyar to the ground as they tried to subdue him.

i. Officer Mazza and Sergeant Drees continually told Mr. Magyar to calm down and that an ambulance was coming.

j. Ultimately seven officers were required to subdue Mr. Magyar.

k. Officers used pressure point pain compliance techniques to restrain him and compel him to release his arms.

l. He was not struck with any items, nor was pepper spray used.

m. Mr. Magyar continued struggling and kicking his feet.

n. Ultimately his ankles were wrapped with a restraint rope, he was handcuffed and turned over.

o. Mr. Magyar appeared unresponsive and officer Trigo and Sergeant Drees checked his pulse and felt for any movement in his chest.

p. Fire rescue arrived, he was unhandcuffed and intubated, but he was handcuffed to each side of the stretcher.

q. During the ambulance ride to the hospital, he began to breathe on his own and became conscious and stated "you're not going to help me. Leave me alone."

r. Mr. Magyar began kicking and the paramedics tried to hold him down by using a towel over his shoulders and collar bone area to try to pull him down onto the stretcher.

s. Officer Petry tried to lay across Mr. Magyar's feet to prevent him from kicking.

t. Officer Drouds [sic], who was driving behind the ambulance saw the ambulance swerve and could see the struggle in the back of the ambulance.

u. According to paramedic, Crawford, Mr. Magyar struggled the entire way to St. Joseph's hospital.

v. As the ambulance pulled into the hospital, Mr. Magyar suddenly collapsed onto the stretcher and lost consciousness.

w. The emergency room physician found that Mr. Magyar had gone into cardiac and respiratory arrest.

9. These undisputed material facts fail to establish in the light most favorable to the Plaintiff that the Defendant officers violated clearly established law. All of the cases cited by the Plaintiff have facts materially different from the facts herein.

10. Additionally the undisputed material facts fail to establish, even in the light most favorable to the Plaintiff, that the officers used excessive force.

11. Absent a showing that the officers actions were "committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety and property" immunity applies. (Fla.Stat. 768 28 (9)(a))

12. The Plaintiff's have failed to meet their burden as to Count V as well.

13. Accordingly, summary judgement [sic] is granted as to the individual defendant officers as to Counts I and V of the Plaintiff's Amended Complaint.

Done and Ordered in chambers, Tampa, Florida, Hillsborough County this 22nd day of May, 2002.

/s/ Vivian C. Maye
Vivian C. Maye,
Circuit Judge

Copies to:

Daniel P. Mitchell, Esq.
Garry J. Rhoden, Esq.
One Tampa City Center
201 N. Franklin Street
Suite 2200
Tampa, Fl. 33602

Peter W. Walsh, Assistant City Attorney
696 First Avenue North
Suite 304
St. Petersburg, Fl. 33701

Donald A. Smith, Jr., Esq.
Gwendolyn R. Hollstrom, Esq.
109 N. Brush Street
Suite 150
Tampa, Fl. 33602

APPENDIX C

Supreme Court of Florida
WEDNESDAY, MARCH 24, 2004

CASE NO.: SC03-1734
Lower Tribunal No.: 2D02-3972

JARROD S. DOUDS, ET AL. vs. JEANETTE THOMPSON, ET AL.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS and BELL, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

[LOGO]

tc:
Served:

DONALD A. SMITH, JR.
GWENDOLYN HOLLSTROM HINKLE
CHRISTINE A. DONOGHUE
DANIEL P. MITCHELL
BRIAN OBLOW

HON. JAMES BIRKHOLD, CLERK
HON. RICHARD L. AKE, CLERK
PETER WALSH
HON. VIVIAN CORVO MAYE, JUDGE

APPENDIX D

U.S. Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * *

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being *twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the Untied States, or as a member of any state legislature, or as an executive of judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

---

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

West's F.S.A. § 316.130

(1) A pedestrian shall obey the instructions of any official traffic control device specifically applicable to the pedestrian unless otherwise directed by a police officer.

(2) Pedestrians shall be subject to traffic control signals at intersections as provided in s. 316.075, but at all other places pedestrians shall be accorded the privileges and be subject to the restrictions stated in this chapter.

(3) Where sidewalks are provided, no pedestrian shall, unless required by other circumstances, walk along and upon the portion of a roadway paved for vehicular traffic.

(4) Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the shoulder on the left side of the roadway in relation to the pedestrian's direction of travel, facing traffic which may approach from the opposite direction.

(5) No person shall stand in the portion of a roadway paved for vehicular traffic for the purpose of soliciting a ride, employment, or business from the occupant of any vehicle.

(6) No person shall stand on or in proximity to a street or highway for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a street or highway.

(7) When traffic control signals are not in place or in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which

the vehicle is traveling or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger. Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.

(8) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

(9) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

(10) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

(11) Between adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk.

(12) No pedestrian shall, except in a marked crosswalk, cross a roadway at any other place than by a route at right angles to the curb or by the shortest route to the opposite curb.

(13) Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

(14) No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic control

devices, and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic control devices pertaining to such crossing movements.

(15) Notwithstanding other provisions of this chapter, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian or any person propelling a human-powered vehicle and give warning when necessary and exercise proper precaution upon observing any child or any obviously confused or incapacitated person.

(16) No pedestrian shall enter or remain upon any bridge or approach thereto beyond the bridge signal, gate, or barrier after a bridge operation signal indication has been given. No pedestrian shall pass through, around, over, or under any crossing gate or barrier at a railroad grade crossing or bridge while such gate or barrier is closed or is being opened or closed.

(17) No pedestrian may jump or dive from a publicly owned bridge. Nothing in this provision requires the state or any political subdivision of the state to post signs notifying the public of this provision. The failure to post a sign may not be construed by any court to create liability on the part of the state or any of its political subdivisions for injuries sustained as a result of jumping or diving from a bridge in violation of this subsection.

(18) No pedestrian shall walk upon a limited access facility or a ramp connecting a limited access facility to any other street or highway; however, this subsection does not apply to maintenance personnel of any governmental subdivision.

(19) A violation of this section is a noncriminal traffic infraction, punishable pursuant to chapter 318 as either a pedestrian violation or, if the infraction resulted from the operation of a vehicle, as a moving violation.

West's F.S.A. § 394.463

(1) Criteria. – A person may be taken to a receiving facility for involuntary examination if there is reason to believe that he or she is mentally ill and because of his or her mental illness:

(a)1. The person has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examination; or

2. The person is unable to determine for himself or herself whether examination is necessary; and

(b)1. Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; or

2. There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.

(2) Involuntary examination. –

(a) An involuntary examination may be initiated by any one of the following means:

1. A court may enter an ex parte order stating that a person appears to meet the criteria for involuntary examination, giving the findings on which that conclusion is based. The ex parte order for involuntary examination must be based on sworn testimony, written or oral. If other less restrictive means are not available, such as voluntary appearance for outpatient evaluation, a law enforcement officer, or other designated agent of the court, shall take the person into custody and deliver him or her to the nearest receiving facility for involuntary examination. The order of the court shall be made a part of the patient's clinical record. No fee shall be charged for the filing of an order under this subsection. Any receiving facility accepting the patient based on this order must send a copy of the order to the Agency for Health Care Administration on the next working day. The order shall be valid only until executed or, if not executed, for the period specified in the order itself. If no time limit is specified in the order, the order shall be valid for 7 days after the date that the order was signed.

2. A law enforcement officer shall take a person who appears to meet the criteria for involuntary examination into custody and deliver the person or have him or her delivered to the nearest receiving facility for examination. The officer shall execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record. Any receiving facility accepting the patient based on this report must send a copy of the report to the Agency for Health Care Administration on the next working day.

3. A physician, clinical psychologist, psychiatric nurse, or clinical social worker may execute a certificate stating that

he or she has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for involuntary examination and stating the observations upon which that conclusion is based. If other less restrictive means are not available, such as voluntary appearance for outpatient evaluation, a law enforcement officer shall take the person named in the certificate into custody and deliver him or her to the nearest receiving facility for involuntary examination. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and certificate shall be made a part of the patient's clinical record. Any receiving facility accepting the patient based on this certificate must send a copy of the certificate to the Agency for Health Care Administration on the next working day.

(b) A person shall not be removed from any program or residential placement licensed under chapter 400 and transported to a receiving facility for involuntary examination unless an ex parte order, a professional certificate, or a law enforcement officer's report is first prepared. If the condition of the person is such that preparation of a law enforcement officer's report is not practicable before removal, the report shall be completed as soon as possible after removal, but in any case before the person is transported to a receiving facility. A receiving facility admitting a person for involuntary examination who is not accompanied by the required ex parte order, professional certificate, or law enforcement officer's report shall notify the Agency for Health Care Administration of such admission by certified mail no later than the next working day. The provisions of this paragraph do not apply when transportation is provided by the patient's family or guardian.

(c) A law enforcement officer acting in accordance with an ex parte order issued pursuant to this subsection may serve and execute such order on any day of the week, at any time of the day or night.

(d) A law enforcement officer acting in accordance with an ex parte order issued pursuant to this subsection may use such reasonable physical force as is necessary to gain entry to the premises, and any dwellings, buildings, or other structures located on the premises, and to take custody of the person who is the subject of the ex parte order.

(e) The Agency for Health Care Administration shall receive and maintain the copies of ex parte orders, professional certificates, and law enforcement officers' reports. These documents shall be considered part of the clinical record, governed by the provisions of s. 394.4615. The agency shall prepare annual reports analyzing the data obtained from these documents, without information identifying patients, and shall provide copies of reports to the department, the President of the Senate, the Speaker of the House of Representatives, and the minority leaders of the Senate and the House of Representatives.

(f) A patient shall be examined by a physician or clinical psychologist at a receiving facility without unnecessary delay and may, upon the order of a physician, be given emergency treatment if it is determined that such treatment is necessary for the safety of the patient or others. The patient may not be released by the receiving facility or its contractor without the documented approval of a psychiatrist, a clinical psychologist, or, if the receiving facility is a hospital, the release may also be approved by an attending emergency department physician with

experience in the diagnosis and treatment of mental and nervous disorders and after completion of an involuntary examination pursuant to this subsection. However, a patient may not be held in a receiving facility for involuntary examination longer than 72 hours.

(g) A person for whom an involuntary examination has been initiated who is being evaluated or treated at a hospital for an emergency medical condition specified in s. 395.002 must be examined by a receiving facility within 72 hours. The 72-hour period begins when the patient arrives at the hospital and ceases when the attending physician documents that the patient has an emergency medical condition. If the patient is examined at a hospital providing emergency medical services by a professional qualified to perform an involuntary examination and is found as a result of that examination not to meet the criteria for involuntary placement, the patient may be offered voluntary placement, if appropriate, or released directly from the hospital providing emergency medical services. The finding by the professional that the patient has been examined and does not meet the criteria for involuntary placement must be entered into the patient's clinical record. Nothing in this paragraph is intended to prevent a hospital providing emergency medical services from appropriately transferring a patient to another hospital prior to stabilization, provided the requirements of s. 395.1041(3)(c) have been met.

(h) One of the following must occur within 12 hours after the patient's attending physician documents that the patient's medical condition has stabilized or that an emergency medical condition does not exist:

1. The patient must be examined by a designated receiving facility and released; or

2. The patient must be transferred to a designated receiving facility in which appropriate medical treatment is available. However, the receiving facility must be notified of the transfer within 2 hours after the patient's condition has been stabilized or after determination that an emergency medical condition does not exist.

(i) Within the 72-hour examination period or, if the 72 hours ends on a weekend or holiday, no later than the next working day thereafter, one of the following actions must be taken, based on the individual needs of the patient:

1. The patient shall be released, unless he or she is charged with a crime, in which case the patient shall be returned to the custody of a law enforcement officer;

2. The patient shall be released, subject to the provisions of subparagraph 1., for outpatient treatment;

3. The patient, unless he or she is charged with a crime, shall be asked to give express and informed consent to placement as a voluntary patient, and, if such consent is given, the patient shall be admitted as a voluntary patient; or

4. A petition for involuntary placement shall be filed in the appropriate court by the facility administrator when treatment is deemed necessary; in which case, the least restrictive treatment consistent with the optimum improvement of the patient's condition shall be made available.

(3) Notice of release. – Notice of the release shall be given to the patient's guardian or representative, to any person who executed a certificate admitting the patient to the receiving facility, and to any court which ordered the patient's evaluation.

West's F.S.A. § 901.15

A law enforcement officer may arrest a person without a warrant when:

(1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.

(2) A felony has been committed and he or she reasonably believes that the person committed it.

(3) He or she reasonably believes that a felony has been or is being committed and that the person to be arrested has committed or is committing it.

(4) A warrant for the arrest has been issued and is held by another peace officer for execution.

(5) A violation of chapter 316 has been committed in the presence of the officer. Such an arrest may be made immediately or in fresh pursuit. Any law enforcement officer, upon receiving information relayed to him or her from a fellow officer stationed on the ground or in the air that a driver of a vehicle has violated chapter 316, may

arrest the driver for violation of those laws when reasonable and proper identification of the vehicle and the violation has been communicated to the arresting officer.

(6) There is probable cause to believe that the person has committed a criminal act according to s. 790.233 or according to s. 741.31 or s. 784.047 which violates an injunction for protection entered pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, over the objection of the petitioner, if necessary.

(7) There is probable cause to believe that the person has committed an act of domestic violence, as defined in s. 741.28. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to strongly discourage arrest and charges of both parties for domestic violence on each other and to encourage training of law enforcement and prosecutors in this area. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection, under s. 741.31(4) or s. 784.047, or pursuant to a foreign order of protection accorded full faith and credit pursuant to s. 741.315, is immune from civil liability that otherwise might result by reason of his or her action.

(8) There is probable cause to believe that the person has committed child abuse, as defined in s. 827.03. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to protect abused children by strongly encouraging the arrest and prosecution of persons who commit child abuse. A law enforcement officer who acts in good faith and exercises due care in making an

arrest under this subsection is immune from civil liability that otherwise might result by reason of his or her action.

(9) There is probable cause to believe that the person has committed:

(a) Any battery upon another person, as defined in s. 784.03.

(b) An act of criminal mischief or a graffiti-related offense as described in s. 806.13.

(c) A violation of a safety zone, security zone, regulated navigation area, or naval vessel protection zone as described in s. 327.461.

(10) The officer has probable cause to believe that the person has knowingly committed an act of repeat violence in violation of an injunction for protection from repeat violence entered pursuant to s. 784.046 or a foreign protection order accorded full faith and credit pursuant to s. 741.315.

(11) The officer has determined that he or she has probable cause to believe that a misdemeanor has been committed, based upon a signed affidavit provided to the officer by a law enforcement officer of the United States Government, recognized as such by United States statute, or a United States military law enforcement officer, recognized as such by the Uniform Code of Military Justice or the United States Department of Defense Regulations, when the misdemeanor was committed in the presence of the United States law enforcement officer or the United States military law enforcement officer on federal military property over which the state has maintained exclusive jurisdiction for such a misdemeanor.

(12)(a) A law enforcement officer of the Florida National Guard, recognized as such by the Uniform Code of Military Justice or the United States Department of Defense Regulations, has probable cause to believe a felony was committed on state military property or when a felony or misdemeanor was committed in his or her presence on such property.

(b) All law enforcement officers of the Florida National Guard shall promptly surrender all persons arrested and charged with a felony to the sheriff of the county within which the state military property is located, and all persons arrested and charged with misdemeanors shall be surrendered to the applicable authority as may be provided by law, but otherwise to the sheriff of the county in which the state military property is located. The Florida National Guard shall promptly notify the applicable law enforcement agency of an arrest and the location of the prisoner.

(c) The Adjutant General, in consultation with the Criminal Justice Standards and Training Commission, shall prescribe minimum training standards for such law enforcement officers of the Florida National Guard.

(13) He or she is employed by the State of Florida as a law enforcement officer as defined in s. 943.10(1) or part-time law enforcement officer as defined in s. 943.10(6), and:

(a) He or she reasonably believes that a felony involving violence has been or is being committed and that the person to be arrested has committed or is committing the felony;

(b) While engaged in the exercise of his or her state law enforcement duties, the officer reasonably believes that a felony has been or is being committed; or

(c) A felony warrant for the arrest has been issued and is being held for execution by another peace officer.

Notwithstanding any other provision of law, the authority of an officer pursuant to this subsection is statewide. This subsection does not limit the arrest authority conferred on such officer by any other provision of law.

(14) There is probable cause to believe that the person has committed an act that violates a condition of pretrial release provided in s. 903.047 when the original arrest was for an act of domestic violence as defined in s. 741.28.

(15) There is probable cause to believe that the person has committed trespass in a secure area of an airport when signs are posted in conspicuous areas of the airport which notify that unauthorized entry into such areas constitutes a trespass and specify the methods for gaining authorized access to such areas. An arrest under this subsection may be made on or off airport premises. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection is immune from civil liability that otherwise might result by reason of the law enforcement officer's action.

(16) There is probable cause to believe that the person has committed assault upon a law enforcement officer, a firefighter, an emergency medical care provider, public transit employees or agents, or other specified officers as set forth in s. 784.07 or has committed assault or battery upon any employee of a receiving facility as defined in

s. 394.455 who is engaged in the lawful performance of his or her duties

---

(2)

No. 03-1697

Supreme Court, U.S.
FILED
JUL 26 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, AND JOHN WOMACK,

Petitioners,

v.

JEANNETTE THOMPSON, AS PLENARY GUARDIAN OF ROBERT MAGYAR, AND CECILIA MAGYAR,

Respondents.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

BRIEF IN OPPOSITION

STUART C. MARKMAN
JAMES E. FELMAN
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive, Suite 1300
Tampa, Florida 33602
(813) 229-1118

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether law enforcement officers' use of force capable of causing serious injury to detain an individual is unreasonable when there is no reason to suspect the individual has committed a crime, the individual is being detained only for his own safety and poses no immediate threat to the officers or others, and the use of force continues after the individual is handcuffed, bound, and face down on the ground?

2. Whether the Florida Second District Court of Appeal's resolution of the qualified immunity claims otherwise conflicts with federal law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE PETITION 7

I. The Decision of the Florida Second District Court of Appeal That Petitioners' Use of Force Capable of Causing Serious Injury to Detain Mr. Magyar Was Unreasonable and Violated Mr. Magyar's Constitutional Rights When Mr. Magyar Had Committed No Crime and Was Being Detained Only for His Own Safety, Mr. Magyar Posed No Immediate Threat to Petitioners or Others, and the Use of Force Continued After Mr. Magyar Was Handcuffed, Bound, and Face Down on the Ground, Does Not Conflict with Federal Law 7

A. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar had committed no crime weighed against the use of force to detain him 9

B. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar posed no immediate threat to the safety of Petitioners or others weighed against the use of force to detain him 13

C. The Second District was consistent with federal caselaw when it held that Mr. Magyar's resistance did not justify the level of force used against him 15

TABLE OF CONTENTS – Continued

Page

II. The Florida Second District Court of Appeal's Holding that Petitioners Are Not Entitled to Qualified Immunity Does Not Otherwise Conflict with Federal Law 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994) 13

Alexis v. McDonald's Rests., Inc., 67 F.3d 341 (1st Cir. 1995) 13

Bailey v. Kennedy, 349 F.3d 731 (4th Cir. 2003) 10, 14, 16, 20

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) 10, 11, 15

Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004) 10, 15, 16, 18, 20

Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003) 12

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Hope v. Pelzer, 536 U.S. 730 (2002) 20, 21

Jones v. Buchanan, 325 F.3d 520 (4th Cir. 2003) 19

LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000) 13

Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) 13

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995) 10, 21

Marsall v. City of Portland, 2004 WL 1048127 (D. Ore. May 7, 2004) 11

Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994) 13

Santos v. Gates, 287 F.3d 846 (9th Cir. 2002) 13

Saucier v. Katz, 533 U.S. 194 (2001) 3, 8, 16, 17

State v. Moore, 791 So. 2d 1246 (Fla. 1st Dist. Ct. App. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Thomas v. State, 614 So. 2d 468 (Fla. 1993) 12

Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998) 13, 18

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) 13

STATUTES

42 U.S.C. § 1983 1

Fla. Stat. § 316.130 12

Fla. Stat. § 901.15 12

BRIEF IN OPPOSITION

The Respondents, Jeannette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Florida Second District Court of Appeal in this case. That opinion is reported at 852 So. 2d 299 (Fla. 2d Dist. Ct. App. 2003), *review denied by* 871 So. 2d 872 (Fla. 2004).

STATEMENT OF THE CASE

Respondents Jeanette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar [referred to collectively as "Mr. Magyar"], sued Petitioners, City of Tampa Police Department Officers Jarrod S. Douds, Franklin M. Drees, Victor Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo, and John Womack [referred to collectively as "Petitioners"], as well as the City of Tampa, in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida. The City of Tampa is not a party to this appeal. Mr. Magyar asserted a claim under 42 U.S.C. Section 1983 alleging that Petitioners violated his rights under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution by using excessive force to detain him. Mr. Magyar also raised a state law battery claim against Petitioners based on their use of excessive force.

As to Mr. Magyar's Section 1983 claim, the trial court held that Mr. Magyar failed to establish that Petitioners used excessive force or violated clearly established law because "[a]ll of the cases cited by the Plaintiff have facts materially different from the facts" of this case. Pet'rs'

App. 7b. The trial court accordingly granted summary judgment in favor of Petitioners on qualified immunity grounds. Pet'rs' App. 7b.

The Florida Second District Court of Appeal reversed the trial court's grant of summary judgment in favor of Petitioners. The court analyzed whether Petitioners' use of force against Mr. Magyar was reasonable using the balancing test set forth by this Court in *Graham v. Connor*, 490 U.S. 386, 396 (1989). Pet'rs' App. 9a-11a. It held that under the considerations set forth in *Graham*, "the individual officers used unreasonable force in detaining Magyar." Pet'rs' App. 11a. The Second District then considered whether the constitutional right Petitioners violated was clearly established. It held that "the law at the time of the incident was sufficiently clear to give the individual officers fair warning that their actions violated Magyar's constitutional rights." Pet'rs' App. 12a. For these reasons, the court concluded, "the trial court erred in granting final summary judgment in favor of the individual officers on this issue." Pet'rs' App. 15a.

The Florida Second District Court of Appeal denied rehearing and the Florida Supreme Court denied Petitioners' petition for review. Pet'rs' App. 21a, 1c.

STATEMENT OF FACTS

Petitioners' Statement of Facts omits most of the record evidence supporting the Florida appellate court's holding that Petitioners are not entitled to qualified immunity. Respondents accordingly submit the following statement of facts which, as the law requires, is presented

in the light most favorable to Mr. Magyar. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

This case involves an encounter between a citizen who had committed no crime and seven law enforcement officers who, under the guise of detaining him "for his safety," performed a combination of "leg sweeps," "tackles," "pain compliance techniques," "hammer fists," and "knee blasts," combined with the use of handcuffs and a "hobble tie," which rendered him permanently and severely brain damaged and reduced to future existence in an unconscious vegetative state. This record presents an overwhelming factual basis for the denial of qualified immunity under established law.

Around 11 p.m. on October 18, 1998, Mr. Magyar was stopped by Officer Salvatore Mazza of the Tampa Police Department while walking across Interstate 275 in Tampa, Florida. Pet'rs' App. 2a; R. 220-21. Although Mr. Magyar was crossing the interstate, he seemed to the officer to be unaware of the traffic. Pet'rs' App. 2a. Officer Mazza thought he was incoherent and confused. R. 221, 1427. When the officer confronted Mr. Magyar, he explained that he was a diabetic with high blood pressure, that his blood sugar was high and he was not feeling well, and that he was walking to the hospital. Pet'rs' App. 2a; R. 221, 1176. At Officer Mazza's request, Mr. Magyar got into the officer's patrol car. Pet'rs' App. 2a. Officer Mazza took Mr. Magyar off the interstate to an abandoned gas station, where the officer called for an ambulance. Pet'rs' App. 2a.

While waiting for the ambulance, Mr. Magyar made statements indicating he believed Officer Mazza wished to hurt him. Pet'rs' App. 2a. When Mr. Magyar later told

Officer Mazza he felt ill, the officer let him out of the patrol car. Pet'rs' App. 2a. Mr. Magyar sat down on one of the abandoned gas station's pump islands. Pet'rs' App. 2a.

After a period of time had passed and the requested ambulance had not arrived, Officer Mazza called to check on its status. Pet'rs' App. 2a, R. 222. Another City of Tampa police officer, Sergeant Franklin Drees, heard Officer Mazza's call and went to the abandoned station. Pet'rs' App. 2a-3a. Mr. Magyar was still seated at the pump island when Sergeant Drees arrived. Pet'rs' App. 3a. While seated, Mr. Magyar continued to make statements indicating he believed the officers wanted to hurt him. Pet'rs' App. 3a.

Eventually, Mr. Magyar got up and began walking away. Pet'rs' App. 3a. Mr. Magyar's home was only three blocks away from the abandoned gas station where Officer Mazza had taken him to wait for the ambulance. Pet'rs' App. 3a n.1. When Officer Mazza ordered Mr. Magyar to stop, he returned and again sat at the pump island. Pet'rs' App. 3a. According to the officers, Mr. Magyar was not suspected of any crime, but was being detained "for his safety." R. 277, 1173, 1190-91, 1433, 1440. A short time later, Mr. Magyar got up again and began to walk away. Pet'rs' App. 3a. Although Officer Mazza ordered Mr. Magyar to stop, this time he continued walking away. Pet'rs' App. 3a.

In response, Officer Mazza and Sergeant Drees chased Mr. Magyar down and grabbed his arms. Pet'rs' App. 3a; R. 224, 1189, 1440. Mr. Magyar then began to struggle, saying that he had not done anything wrong and wanted to go home and pleading with the officers not to kill him. Pet'rs' App. 3a; R. 1441. Sergeant Drees used "leg sweeps"

on Mr. Magyar and Officer Mazza grabbed Mr. Magyar's leg and "tackled" Mr. Magyar to the ground. Pet'rs' App. 3a; R. 224, 238, 1191, 1444. Officer Mazza and Sergeant Drees continued to struggle with Mr. Magyar and eventually got him face down on the ground. Pet'rs' App. 3a; R. 1191-92. Officer Mazza was "on top" of Mr. Magyar during this struggle, while Sergeant Drees was either lying on top of Mr. Magyar or on the back of his shoulder, using his body weight to keep Mr. Magyar on the ground. Pet'rs' App. 3a, 4a; R. 247, 268, 280.

Sergeant Drees called for backup, and five Tampa Police Officers – Victor Gomez, Kevin Petry, Jarrod Douds, John Womack, and Charles Trigo – responded to the call. Pet'rs' App. 4a; R. 298. Each of these five additional officers contributed to the physical detention of Mr. Magyar. Officer Douds pinned Mr. Magyar's left shoulder with his leg and held Mr. Magyar's head down with his hand. Pet'rs' App. 4a; R. 247, 1342, 1344-45. Officer Douds also used "pain compliance techniques" against Mr. Magyar, delivering a "hammer fist" strike in the area of Mr. Magyar's shoulder blade, then digging his elbow and forearm into the same portion of Mr. Magyar's back. Pet'rs' App. 4a; R. 208, 248, 286, 289, 1346-48, 1373. Officer Petry grabbed one of Mr. Magyar's arms and brought it behind his back so Mr. Magyar could be handcuffed. R. 204, 1640. Officer Womack handcuffed Mr. Magyar's hands behind his back. R. 286-87, 1197-98. Officer Womack also used two or three "knee blasts" to get Mr. Magyar's legs down, sufficiently hard that Sergeant Drees felt the "jolt" to Mr. Magyar's body. Pet'rs' App. 4a; R. 225, 239, 281, 285, 286, 288-89. Officer Gomez lay across Mr. Magyar's legs and Officer Trigo straddled Mr. Magyar's lower legs. R. 196, 1373. Officer Trigo then retrieved "hobble tie" restraint ropes

and, with Officer Mazza by that time sitting across Mr. Magyar's lower back, buttocks, or legs, tied the ropes around Mr. Magyar's ankles. R. 226, 299, 307, 1198, 1585.

Even after Mr. Magyar was handcuffed and his legs were "hobble tied," he was kept face down with several officers lying across him until he "went limp." Pet'rs' App. 4a; R. 213, 256, 265, 287, 293, 1350. After Mr. Magyar went limp, the officers rolled him over. Pet'rs' App. 4a. At that point, Mr. Magyar was unresponsive and not breathing, and his lips were blue. Pet'rs' App. 4a; R. 205, 293, 1351, 1374. There were abrasions on Mr. Magyar's face and his nose was bleeding. Pet'rs' App. 4a-5a.

The ambulance arrived, and Mr. Magyar was taken to the hospital. At the time he arrived at the hospital, Mr. Magyar was in total cardiac and respiratory arrest. Pet'rs' App. 5a. His head was bleeding in at least five places, he had bruises all over his head, face, and arms, and there were fingernail gouges on his neck. R. 1035, 1242-43, 1688-90.

Since that night, Mr. Magyar has remained in a persistent vegetative state. Pet'rs' App. 5a. The multiple head wounds Mr. Magyar suffered continued to bleed for months. R. 1253. Later diagnostic tests indicated Mr. Magyar suffered from "severe and irreversible brain damage" caused by oxygen deprivation with the "contributing factors" of "body and head trauma." Appellant's Init. Br. at App. A.

REASONS FOR DENYING THE PETITION

I. The Decision of the Florida Second District Court of Appeal That Petitioners' Use of Force Capable of Causing Serious Injury to Detain Mr. Magyar Was Unreasonable and Violated Mr. Magyar's Constitutional Rights When Mr. Magyar Had Committed No Crime and Was Being Detained Only for His Own Safety, Mr. Magyar Posed No Immediate Threat to Petitioners or Others, and the Use of Force Continued After Mr. Magyar Was Handcuffed, Bound, and Face Down on the Ground, Does Not Conflict with Federal Law.

The Petition for a Writ of Certiorari should be denied. The Florida Second District Court of Appeal's holding that Petitioners are not entitled to qualified immunity conflicts with no federal caselaw. In an attempt to suggest a conflict exists, Petitioners resort to framing an issue that is presented neither by the opinion of the Second District nor by the record in this case: "Whether a law enforcement officer may lawfully seize a person, although that person has not committed a crime, if the officer has probable cause to believe that there is a substantial likelihood that the person is a danger to himself or others." Pet. Writ Cert. at i.

The question in this case is not whether the law permitted Petitioners to *seize* Mr. Magyar. Instead, the issue the Second District decided was whether the *amount of force* Petitioners used violated constitutional rights that were clearly established at the time of the seizure. Once the issue is accurately framed, it is immediately apparent that Second District's resolution of that issue was required by, not in conflict with, the established law.

The Second District's opinion is a straightforward application of the law established in *Saucier v. Katz*, 533 U.S. 194 (2001), and *Graham v. Connor*, 490 U.S. 386 (1989). *Saucier* held that when a court determines whether a defendant is entitled to qualified immunity, it must consider two questions: (1) whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right" and, if so, (2) "whether the right was clearly established." 533 U.S. at 201. At the first step of the *Saucier* analysis in an excessive force case, *Graham* requires courts to determine "whether the force used to effect a particular seizure is 'reasonable'" – and therefore whether the facts alleged show a constitutional violation – by weighing "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). The proper application of this balancing test "requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

After undertaking a detailed analysis according to the framework in *Saucier* and *Graham*, the Second District held Petitioners are not entitled to qualified immunity on Mr. Magyar's excessive force claim as a matter of law. Pet'rs' App. 8a-15a. As explained below, the Second District's application of the established law was correct and consistent with federal caselaw.

A. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar had committed no crime weighed against the use of force to detain him.

The Second District properly concluded that the first *Graham* factor, "the severity of the crime at issue," weighed against the force used to detain Mr. Magyar. The court stated:

> First, Magyar was not suspected of committing any crime. At the most, he had committed an infraction that would subject him to a civil citation but not detention. At the least, he was simply waiting voluntarily with the police for an ambulance to arrive. When no crime has been committed, this fact weighs heavily in favor of finding the use of force excessive. Because serious force is appropriate for a more serious crime and less force is appropriate for a less serious offense, the fact that Magyar had committed no offense at all militates against the use of any force – much less the force used in this case to effect Magyar's detention. That Magyar was a "big guy" . . . is irrelevant because the use of force was improper ab initio.

Pet'rs' App. 10a (citation omitted).

Petitioners contend the Second District failed to address their argument that Mr. Magyar was properly detained because they had probable cause to believe he was a danger to himself and others. Pet. Writ Cert. at 13-15. In support of that argument, Petitioners cite a line of cases holding that the Fourth Amendment allows an officer with probable cause to believe a person is a danger to himself or others to seize that person. Pet. Writ Cert. at 13-14.

Petitioners' argument overlooks the issue in this case, which is not whether Petitioners had probable cause to seize Mr. Magyar, but whether the force they used to detain him was so unreasonable as to violate Mr. Magyar's constitutional rights. *Graham*'s balancing test must be applied to "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure.'" 490 U.S. at 395 (emphasis in original). Consistent with this requirement, the federal courts apply *Graham* to determine whether the level of force used to detain a mentally ill person was reasonable. *See, e.g.*, *Bailey v. Kennedy*, 349 F.3d 731, 743-44 (4th Cir. 2003); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056-59 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871 (2004); *Deorle v. Rutherford*, 272 F.3d 1272, 1280-85 (9th Cir. 2001).

Just as the Second District did, courts applying *Graham* to determine the reasonableness of the force used to detain a mentally ill person give great weight to the fact that the detained individual has committed no crime. *Bailey*, 349 F.3d at 743-44; *Drummond*, 343 F.3d at 1057; *Deorle*, 272 F.3d at 1280, 1282. "The character of the offense is often an important consideration in determining whether the use of force was justified." *Deorle*, 272 F.3d at 1280. Where "the person seized is not a 'suspect' [and] has committed no crime when the police approach, . . . the 'importance of the governmental interests alleged to justify the intrusion' is necessarily diminished." *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) (quoting *Garner*, 471 U.S. at 9).

If anything, the fact that Petitioners believed Mr. Magyar to be mentally ill required them to be more cautious in their use of force. "When police are confronted by

an unarmed, emotionally distraught individual who has committed no serious crime, . . . the governmental interest in using force is diminished, not strengthened, even when the suspect is irrational and inviting the use of force." *Marsall v. City of Portland*, 2004 WL 1048127, at *11 (D. Ore. May 7, 2004); *see also Deorle*, 272 F.3d at 1283 ("where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed"). Whether or not Petitioners had probable cause to seize Mr. Magyar, the Second District was correct and perfectly consistent with federal caselaw when it recognized that the fact he had committed no crime weighed against the use of force to detain him.

Petitioners also argue that the Second District failed to address the possibility that Mr. Magyar's detention may have been justified by his violation of Florida traffic control laws. Pet. Writ Cert. at 17. Because Florida Statutes section 901.15(5) "authorizes a Florida law enforcement officer to arrest an individual he witnesses violating" a traffic control statute, Petitioners' argument runs, "another reason that Mr. Magyar's constitutional right to be free from illegal seizure was not violated is because Officer Mazza had statutory authority to arrest Mr. Magyar after he saw him walking in the middle of the highway." Pet. Writ Cert. at 17.

Petitioners' argument fails for at least three reasons. First, it is directly contradicted by Petitioners' own testimony. According to that testimony, Mr. Magyar was detained "for his safety," not because he was suspected of a crime. R. 277, 1173, 1190-91, 1433, 1440.

Second, Petitioners misapprehend the law in Florida regarding the level of detention that can be imposed for the type of traffic infraction they say Mr. Magyar committed. Under Florida law, a violation of the requirement that pedestrians walking on a highway "shall, when practicable, walk only on the shoulder on the left side of the roadway" is a "noncriminal traffic infraction." Fla. Stat. § 316.130(4), (19). The rule in Florida is that section 901.15 permits an "arrest" for a noncriminal traffic infraction only "for the limited purpose of issuing a ticket, summons, or notice to appear." *Thomas v. State*, 614 So. 2d 468, 471 (Fla. 1993); *see also State v. Moore*, 791 So. 2d 1246, 1249 (Fla. Ct. App. 2001).[1] Had Petitioners' reason for detaining Mr. Magyar really been their suspicion that he was walking on the wrong part of the roadway, they would have been required to release him once he had been given a citation. They would not have been permitted to sweep his legs out from under him, tackle him, force him to the ground, use pain compliance techniques and deliver a "hammer fist blow" to him, handcuff him behind his back, administer "knee blasts" to him, straddle him, "hobble tie" him, and lay across him until his body went limp.

---

[1] Petitioners rely on *Durruthy v. Pastor*, 351 F.3d 1080 (11th Cir. 2003), for the proposition that section 901.15(5) authorized Mr. Magyar's arrest for violating a Florida traffic control statute. Pet. Writ Cert. at 17. *Durruthy* does not involve an arrest for walking on a highway. 351 F.3d at 1085-86. To the extent the Eleventh Circuit's holding in *Durruthy* could be read broadly to suggest section 901.15(5) authorizes a custodial arrest for any noncriminal infraction under Florida's traffic control statutes, such a holding would conflict with the Florida Supreme Court's interpretation of that statute.

Third, Petitioners' argument misses the issue – again. The question is not whether Petitioners had reason to detain Mr. Magyar, but whether the level of force used to detain him was reasonable. The federal courts consistently hold that little or no force is justified to detain an individual suspected of a non-serious offense. *See, e.g., Vinyard v. Wilson*, 311 F.3d 1340, 1347 (11th Cir. 2002); *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002); *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002); *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000); *Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998); *Alexis v. McDonald's Rests., Inc.*, 67 F.3d 341, 353 (1st Cir. 1995); *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994); *Adams v. Metiva*, 31 F.3d 375, 385 (6th Cir. 1994).

Accordingly, when the Second District held that "the fact that Magyar had committed no offense at all militates against the use of any force – much less the force used in this case," Pet'rs' App. 10a, it was in step with the federal caselaw. There is no jurisdiction-vesting conflict in this case.

B. The Second District was consistent with federal caselaw when it held that the fact Mr. Magyar posed no immediate threat to the safety of Petitioners or others weighed against the use of force to detain him.

The second *Graham* factor is "whether the suspect poses an immediate threat to the safety of the officers or others." 490 U.S. at 396. In applying that factor, the Second District held that it too weighed against the use of force to detain Mr. Magyar:

> Second, taking the evidence in the light most favorable to [the Plaintiffs], Magyar did not pose an immediate threat to either the officers or others. Clearly, when Magyar walked quickly away from the officers, he posed absolutely no threat to them. Further, there is no evidence that Magyar posed any immediate threat to others. While the individual officers asserted that Magyar *might* have been heading back to the interstate where he *might* have caused an accident which *might* have injured others, this chain of speculation does not establish that Magyar posed an *immediate* threat to either others or himself. Further, the individual officers' assertion that Magyar's health might have resulted in him falling into a diabetic coma on the side of the road cannot change the fact that their use of force was unreasonable. As noted in *Graham*, the officers' good intentions cannot make the use of unreasonable force constitutional.

Pet'rs' App. 10a-11a (emphasis in original).

Petitioners contend that the Second District "second-guessed the Officers' decision in light of 20/20 hindsight and found their fear that Mr. Magyar might hurt himself or others was too speculative." Pet. Writ Cert. at 15. Not so. The Second District correctly recognized that the second *Graham* factor requires consideration of whether the detainee "poses an *immediate* threat to the safety of the officers or others." 490 U.S. at 396 (emphasis added); *see also Bailey*, 349 F.3d at 744 (second *Graham* factor weighed against use of force where unarmed detainee was not "an immediate threat to himself or the officers"). In this case, Mr. Magyar presented no immediate threat to Petitioners or others. He was unarmed and off of the highway at the time he was forcibly restrained. As the

Second District explained, any concern he might cause an accident rested on a chain of speculation and was not an "immediate threat." Pet'rs' App. 10a. "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle*, 272 F.3d at 1281.

Nor did the possibility Mr. Magyar was a danger to himself justify the force used to detain him. Where the person seized is "a mentally disturbed individual not wanted for any crime, who was being taken into custody to prevent injury to himself[, d]irectly causing him grievous injury does not serve that objective in any respect." *Drummond*, 343 F.3d at 1059. "Protecting" Mr. Magyar did not require tackling him, inflicting "pain compliance techniques," delivering a "hammer fist" blow, "hobble tying" him, or holding him face down on the ground with such force that he was rendered unconscious.

C. The Second District was consistent with federal caselaw when it held that Mr. Magyar's resistance did not justify the level of force used against him.

As to the third *Graham* factor, whether Mr. Magyar was "actively resisting arrest or attempting to evade arrest by flight," the Second District stated:

> Third, while there is evidence to show that Magyar was resisting the officers' efforts to detain him, this fact simply does not warrant the amount of force used in this case. The evidence shows that the officers continued to exert force against Magyar even after he was handcuffed and after his legs were bound with rope. The use

> of the officers' body weight to prevent Magyar from rolling when he was already handcuffed and bound was simply not necessary to effect his detention or to prevent harm to the officers or others.

Pet'rs' App. 11a.

Petitioners do not directly address the Second District's analysis of the third *Graham* factor. Instead, they attempt to sidestep the issue based on their assertion that because the court "failed to correctly apply the *Saucier* analysis and failed to directly address whether Officer Mazza and Sergeant Drees had probable cause to detain Mr. Magyar, the balance of [the] court's application of the *Graham* test is undeniably and irreconcilably skewed against a finding of qualified immunity for any of the Officers." Pet. Writ Cert. at 15.

As discussed above, the Second District applied *Saucier* and *Graham* to the real issue in this case, which is whether the force used to detain Mr. Magyar was excessive. Just as that application was correct and consistent with federal caselaw with respect to the first and second *Graham* factors, it is correct and consistent with the third. Mr. Magyar's resistance when Petitioners seized him, especially after his hands were cuffed and his feet were bound, did not begin to justify the level of force Petitioners used. *See Bailey*, 349 F.3d at 744 (holding the third *Graham* factor did not weigh completely against the detained individual when he initially resisted arrest but "was not resisting arrest when he was bound hand and foot and lying face down on the floor"); *Drummond*, 343 F.3d at 1058 ("All three *Graham* factors would have permitted the use of only minimal force once [the detainee] was handcuffed and lying on the ground").

Petitioners used so much force on an unarmed, handcuffed, and bound man who was suspected of no crime that he was left in a permanent vegetative state. The Second District's conclusion that "the individual officers used unreasonable force in detaining Magyar," Pet'rs' App. 11a, came only after it applied the three *Graham* factors in a way that was both correct and consistent with federal caselaw.

II. The Florida Second District Court of Appeal's Holding that Petitioners Are Not Entitled to Qualified Immunity Does Not Otherwise Conflict with Federal Law.

Petitioners' second issue is a laundry list of complaints about the Second District's opinion. None presents an error by the Second District, much less a conflict with federal law.

Petitioners first argue that the Second District's opinion conflicts with *Saucier* because it does not separately analyze each Petitioner's entitlement to qualified immunity. According to Petitioners, the Second District "failed to specify" in its opinion what actions Officer Petry or Officer Trigo took that violated Mr. Magyar's constitutional rights and failed to explain in detail what actions Officer Gomez took that precluded him from being entitled to qualified immunity. Pet. Writ Cert. at 19.

The real significance of Petitioners' complaint that the Second District failed to detail the actions of Officers Petry, Trigo, and Gomez is what it does *not* contain: an argument that the record shows these officers did not participate in the use of force to detain Mr. Magyar. No such argument could succeed. The record shows that all

three of these officers actively participated in the forcible detention of Mr. Magyar. Officer Petry helped to handcuff Mr. Magyar's arms; Officer Gomez laid across Mr. Magyar's legs; and Officer Trigo first straddled Mr. Magyar's lower legs, then retrieved a "hobble tie" rope and used it to tie Mr. Magyar's ankles. R. 196, 204, 226, 299, 307, 1198, 1373, 1585, 1640.

Petitioners cite no case suggesting that the Second District was required to detail every action by each officer denied qualified immunity. There is no requirement under federal or Florida law that an appellate court reviewing a qualified immunity decision must set out factual findings as to each officer claiming qualified immunity. To the contrary, it is not unusual for appellate opinions addressing immunity claims by groups of officers to decline to specifically discuss the actions of each officer. *See, e.g., Drummond*, 343 F.3d 1054-55, 1063 (denying qualified immunity to four officers; discussing specifically actions of only two); *Thornton*, 132 F.3d at 1398, 1400 (holding three officers not entitled to qualified immunity as to excessive force claim; detailing actions of only one).

Petitioners' related complaint that the Second District "fails to specify what portions of the record it relies upon" to conclude Petitioners were not entitled to qualified immunity, Pet. Writ Cert. at 21, is also unfounded. There is no requirement under Florida or federal law that an appellate opinion cite the specific portions of the record it relies on in resolving a qualified immunity claim.

Petitioners also assert that the Second District failed to analyze the reasonableness of Petitioners' actions from the individual perspective of each officer before holding

they were not immune. Pet. Writ Cert. at 19-20. That contention fails for two reasons.

First, it is apparent from the Second District's opinion that the court considered the objective reasonableness of each officer's actions. The Second District stated that "the reasonableness test is an objective one." Pet'rs' App. 9a (citing *Graham*, 490 U.S. at 397). It considered Petitioners' actions under *Graham*'s three-factor balancing test, and held that "the facts as alleged support a finding that *the individual officers* violated Magyar's Fourth Amendment rights." Pet'rs' App. 10a-11a (emphasis added). The Second District went on to consider "whether *the individual officers* should have known based on the state of the law at the time of the incident that their actions violated Magyar's Fourth Amendment rights." Pet'rs' App. 11a (emphasis added). Following a detailed analysis of the law at the time Mr. Magyar was detained, the Second District concluded that "[b]ecause the facts alleged by [the Plaintiffs] show the violation of a constitutional right and because that right was sufficiently clearly established for *the individual officers* to have fair warning that their conduct was unlawful, the trial court erred in granting final summary judgment in favor of the individual officers on this issue." Pet'rs' App. 11a-15a (emphasis added).

Second, the Second District's conclusion that none of the Petitioners is entitled to qualified immunity is consistent with federal caselaw. "[C]ourts have consistently applied" *Graham*'s objective reasonableness standard "and have consistently held that officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity." *Jones v. Buchanan*, 325 F.3d 520, 532 (4th Cir. 2003).

Each of the Petitioners participated in the forcible detention that left Mr. Magyar in a permanent vegetative state. Federal cases hold law enforcement officers are not entitled to qualified immunity under strikingly similar circumstances. In *Drummond*, for example, the court held that officers who "were called to take a mentally ill individual into custody for his own safety, but within a half-hour, . . . had caused him to fall into a coma that has left him in a permanent vegetative state" by using their body weight to hold him face down after he was already handcuffed "had 'fair warning' that the force they used was constitutionally excessive." 343 F.3d at 1061, 1063. "*Any* reasonable officer," the *Drummond* court stated, "should have known that such conduct constituted the use of excessive force." *Id.* at 1061 (emphasis in original). Similarly, the *Bailey* court held the officers "violated clearly established law in using force to seize [a mentally ill individual] when he had committed no crime and when they had no reason to believe he was a danger to himself or others." 349 F.3d at 745. "It was especially clear that they were not entitled to use force after [the detainee] was secured face down on the floor in handcuffs and leg restraints." *Id.*

Finally, Petitioners argue that instead of resolving the qualified immunity issues, the Second District should have remanded the case to the trial court for reconsideration under the correct legal standard as set forth in *Hope v. Pelzer*, 536 U.S. 730 (2002). Pet. Writ Cert. at 20-21. Petitioners are mistaken. Remand was not only unnecessary, it would have caused further delay and waste of judicial resources.

In that regard, the trial court granted summary judgment in favor of the officers based in part on its

holding that "[a]ll of the cases cited by the Plaintiff have facts materially different from the facts" of this case. Pet'rs' App. 7b. Shortly thereafter, this Court held in *Hope* that "cases with 'materially similar' facts" are not necessary to a finding that a constitutional right is clearly established. 536 U.S. at 741. Although the Second District recognized that the trial court applied the wrong legal standard, it declined to remand the case for reconsideration under *Hope* "because it is clear from the record that the individual officers are not entitled to qualified immunity as a matter of law at this stage of the proceedings." Pet'rs' App. 8a.

Petitioners do not and cannot argue the Second District was required to remand the case rather than decide the qualified immunity issue itself. Qualified immunity issues are reviewed *de novo*. *Ludwig*, 54 F.3d at 470. The Second District was in as good a position as the trial court to determine whether Petitioners were entitled to summary judgment. Further, as the Second District recognized, the *Hope* decision did not announce a new rule, but was "based on prior precedent from the Supreme Court." Pet'rs' App. 8a. In fact, in *Hope* the Supreme Court reversed outright decisions granting summary judgment based on qualified immunity. 536 U.S. at 748. It did not remand the case for reconsideration, and there was no need for the Second District to do so either.

The reversal in this case was both correct and judicially economical. Petitioners suggest a remand would have allowed the trial court to "further develop the record as to the individual Officers' actions, if necessary." Pet. Writ Cert. at 21. But the record in this case is already thousands of pages long. It contains, among other things, the transcripts of the internal affairs interviews of each

Petitioner, transcripts of each Petitioner's deposition, and Petitioners' responses to the Plaintiffs' requests for admissions. There was ample evidence in the record for the Second District to decide the qualified immunity issue.

Petitioners complain that the events of October 18, 1998, "have occupied a part of their lives for close to six (6) years." Pet. Writ Cert. at 9. Mr. Magyar's life was effectively ended six years ago by Petitioners' unconstitutional actions, but his case has yet to go to trial, and he has yet to receive compensation for his grievous injuries. The Second District's decision to avoid further delay was appropriate and just.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STUART C. MARKMAN
Florida Bar No. 0322571
JAMES E. FELMAN
FLORIDA BAR NO. 0775568
Counsel of Record
KYNES, MARKMAN & FELMAN, P.A.
100 South Ashley Drive,
Suite 1300
Tampa, Florida 33602
Telephone:(813) 229-1118
Facsimile:(813) 221-6750

Counsel for Respondents

(3)

No. 03-1697

Supreme Court, U.S.
FILED
AUG 26 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, AND JOHN WOMACK,

Petitioners,

v.

JEANNETTE THOMPSON, AS PLENARY GUARDIAN OF ROBERT MAGYAR AND CECILIA MAGYAR,

Respondents.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

REPLY BRIEF FOR THE PETITIONER-OFFICERS

DONALD A. SMITH, JR.
ANNE CAVANAUGH JONES
Counsel of Record
SMITH & TOZIAN, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
(813) 273-0063

Counsel for Petitioner-Officers

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF AUTHORITIES

Page

CASES

Anthony v. City of New York, 339 F.3d 129 (2nd Cir. 2003) 4

Bailey v. Kennedy, 349 F.3d 731 (4th Cir. 2003) 4

Boyd v. Benton County, 374 F.3d 773 (9th Cir. 2004) 5

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) 5

District of Columbia v. Evans, 644 A.2d 1008 (D.C. 1994) 4

Doby v. DeCrescenzo, 171 F.3d 858 (3rd Cir. 1999) 4

Ensley v. Soper, 142 F.3d 1402 (11th Cir. 1998) 7

Ghandi v. Police Dep't of Detroit, 747 F.2d 338 (6th Cir. 1984), *cert. denied*, 484 U.S. 1042 (1988) 6

Glass v. Mayas, 984 F.2d 55 (2nd Cir. 1993) 4

Gooden v. Howard County, 954 F.2d 960 (4th Cir. 1992) (*en banc*) 4

Graham v. Connor, 490 U.S. 386 (1989) 2, 3, 7

Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) 4

Howard v. Schoberle, 907 F.Supp. 671 (S.D.N.Y. 1995) 6

James ex rel. James v. Sadler, 909 F.2d 834 (5th Cir. 1990) 6

LeSavage v. White, 755 F.2d 814 (11th Cir. 1985) 4

Linbrugger v. Abercia, 363 F.3d 537 (5th Cir. 2004) 4

Maag v. Wessler, 960 F.2d 773 (9th Cir. 1991) 4

Melear v. Spears, 862 F.2d 1177 (5th Cir. 1989) 6

TABLE OF AUTHORITIES – Continued

Page

Mercado v. City of Orlando, 323 F.Supp.2d 1266 (M.D. Fla. 2004) 3, 4

Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997) 3, 4

Saucier v. Katz, 533 U.S. 194 (2001) 2, 3, 5, 7

Sherman v. Four County Counseling Ctr., 987 F.2d 397 (7th Cir. 1993) 4

Villanova v. Abrams, 972 F.2d 792 (7th Cir. 1992) 4

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 1

U.S. Const. amend. IV 1

U.S. Const. amend. V 1

U.S. Const. amend. XIV 1

Fla. Stat. § 394.463 3

REPLY BRIEF FOR PETITIONER-OFFICERS

The Florida Second District Court of Appeal, in its decision reversing the trial court's judgment granting the Petitioner-Officers qualified immunity, failed to address fundamental constitutional issues impacting the qualified immunity analysis. As explained in the petition of certiorari, that ruling conflicts with the greater weight of federal case law, casts doubt upon seizures performed under Florida's Mental Health Act and engenders confusion as to the amount of force that may be used during seizures. The Second District's holding also conflicts with decisions of this Court and the Eleventh Circuit Court of Appeals as to the scope of an individual officer's liability. Review by this Court is therefore clearly warranted.

1. Respondents contend that the Petitioner-Officers "resort to framing an issue that is presented neither by the opinion of the Second District nor by the record in this case" *Brief in Opp.*, at 7. Respondents' argument overlooks their Amended Complaint filed in this matter, which alleges violations of Mr. Magyar's First, Fourth, Fifth and Fourteenth Amendment Rights by the Petitioner-Officers in part because the Petitioner-Officers'

> actions in attempting to seize Robert Magyar's person were unreasonable, unjustified, unnecessary, and excessive to effect any lawful purpose that the Individual Defendants may have sought to accomplish. Such actions constituted (1) an unreasonable seizure of Robert Magyar under the Fourth and Fourteenth Amendments to the United States Constitution, (2) a deprivation of life and liberty without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and (3) a violation of

> Robert Magyar's right to freely associate with others under the First and Fourteenth Amendments to the United States Constitution.

App. 3e. The Respondents' claim alleging an unconstitutional seizure had to be addressed in order to fully decide the Officers' entitlement to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (concluding that when deciding whether an officer is entitled to qualified immunity, a court must first determine whether the officer's alleged conduct violates a constitutional right).

Respondents further argue: "petitioners contend the Second District failed to address their argument that Mr. Magyar was properly detained because they had probable cause to believe he was a danger to himself or others." *Brief in Opp.*, at 9. The issue the Second District Court failed to address was not an 'argument' launched by the Petitioner-Officers. Instead it was a mixed legal and factual finding made by the trial court as part of its ruling that the Officers were entitled to qualified immunity as a matter of law. App., *Pet. for Cert.*, at 3b-7b, 7b ¶ 7. Accordingly, the issue of whether the Officers had probable cause to detain Mr. Magyar should not be side-stepped or avoided.

It is true that the constitutionality of the Petitioner-Officers' seizure of Mr. Magyar does not end the qualified immunity analysis, because Respondents also assert that the force used in seizing Mr. Magyar was excessive. App., *Pet. for Cert.*, at 6e. But the constitutionality of the seizure must be the beginning of the analysis. *Saucier*, 533 U.S. 194, 201; *Graham v. Connor*, 490 U.S. 386, 388 (1989) (concluding that any analysis of excessiveness of the use of force requires a careful balancing of the nature and

quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake).

When an officer lawfully seizes an individual, even where the individual has not committed a crime, the seizing officer is entitled to use reasonable force to take the person into custody. *See, e.g., Mercado v. City of Orlando*, 323 F.Supp.2d 1266, 1272 n.5 (M.D. Fla. 2004) (*citing Graham*, 490 U.S. at 395; *Monday v. Oullette*, 118 F.3d 1099, 1104 (6th Cir. 1997); and Fla. Stat. § 394.463 (Florida's Mental Health Act)). Only after a full analysis of the constitutionality of the seizure is complete may an accurate application of the *Graham* factors be performed to determine whether any force used was excessive. *Saucier*, 533 U.S. at 201; *Graham*, 490 U.S. at 388.

The Petitioners seek this Court's review because the Second District Court of Appeal, rather than determining the constitutionality of the Officers' seizure, assumed the seizure was without legal and/or constitutional justification, despite the trial court's ruling to the contrary. By failing to address the constitutionality of the Officers' seizure, the Second District Court has cast doubt as to the constitutionality of the seizure of any individual who otherwise meets the criteria under Florida's Mental Health Act. The Second District's ruling has also engendered confusion among Florida law enforcement officers as to whether any amount of force may constitutionally be used during such a seizure. *Compare* App. 9a-15a *with* App. 3b-5b, 5b ¶ 7. This Court should accept certiorari to clarify this area of the law.

2. Respondents do not dispute that the greater weight of federal law holds that a Fourth Amendment analysis should be applied to determine whether a law enforcement officer lawfully seized an individual under state involuntary commitment laws. *See, e.g., Bailey v. Kennedy*, 349 F.3d 731, 739-42 (4th Cir. 2003) (relied upon by Respondents, *Brief in Opp.*, at 10, 14, 16 and 20, undertaking probable cause inquiry in determining constitutionality of seizure). Nor could Respondents so argue. *Linbrugger v. Abercia,* 363 F.3d 537, 541 (5th Cir. 2004); *Anthony v. City of N.Y.,* 339 F.3d 129, 136-38 (2nd Cir. 2003); *Doby v. DeCrescenzo,* 171 F.3d 858, 871 (3rd Cir. 1999); *Monday*, 118 F.3d at 1102; *District of Columbia v. Evans,* 644 A.2d 1008, 1015-17 (D.C. 1994); *Glass v. Mayas*, 984 F.2d 55, 58 (2nd Cir. 1993); *Sherman v. Four County Counseling Ctr.,* 987 F.2d 397, 401 (7th Cir. 1993); *Gooden v. Howard County*, 954 F.2d 960, 967-68 (4th Cir. 1992) (*en banc*); *Villanova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992); *Maag v. Wessler*, 960 F.2d 773, 775-76 (9th Cir. 1991); *LeSavage v. White*, 755 F.2d 814, 821 (11th Cir. 1985) (law enforcement officer was immune from liability for taking individual into custody under Florida's Mental Health Act where he had probable cause to believe detainee could be dangerous to herself or others); *Harris v. Pirch*, 677 F.2d 681, 686 (8th Cir. 1982); *Mercado*, 323 F.Supp.2d at 1272 n.5.

Instead, Respondents attempt to rehabilitate the Second District's opinion by making a broad comparison to the Second District's analysis with federal case law regarding use of excessive force. *Brief in Opp.,* at 7-17. The Second District Court's opinion, however, cannot be rehabilitated after the fact. This Court should grant certiorari to clarify the law as to the constitutionality of a seizure

under state involuntary commitment laws and the quantum of force that may lawfully be used during such a seizure.

3. Respondents contend that the Petitioner-Officers have failed to "cite [any] case suggesting that the Second District was required to detail every action by each officer denied qualified immunity." *Brief in Opp.*, at 18. The Petitioner-Officers relied upon the analysis in the concurrence of this Court's decision in *Saucier*, 533 U.S. at 211-12 (J. Ginsburg concurring) for the proposition that each officer claiming qualified immunity is entitled to a separate analysis of his individual actions. *Pet. for Cert.*, at 18. Respondents contend that because each of the Petitioner-Officers in some way participated in the seizure or use of force to detain Mr. Magyar, each officer should be denied his presumed protection under qualified immunity. *Brief in Opp.*, at 20. Review of Respondents' authorities reveals that there is, in fact, a federal circuit split with regard to the issue of an individual officer's liability for group actions. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (*citing Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), one of Respondent's authorities, *Brief in Opp.*, at 10, 11 and 15). Because this conflict affects the interests of the seven Officers, as well as the interests of thousands of law enforcement officers, this Court should accept certiorari to determine whether an individual officer is entitled to an analysis of his own actions in determining that officer's entitlement to qualified immunity.

The Ninth Circuit Court of Appeals applies the "integral participation" theory to find back-up officers whose actions were "integral" to the constitutional violation to be participants rather than mere bystanders and therefore liable, even where their own actions do not constitute a

constitutional violation. *Boyd*, 374 F.3d at 780 (relying for an example of the "integral participation" theory on *James ex rel. James v. Sadler*, 909 F.2d 834 (5th Cir. 1990), *see also*, *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989) (concluding, under the 'integral participation' theory, a sheriff's deputy could be individually liable for property damages caused by an unconstitutional search even though that particular officer's actions did not violate constitutional law). The Fifth Circuit Court of Appeals also follows the 'integral participation' theory and appears to have created this broad-based theory of liability. *Sadler*, 909 F.2d at 837-38; *Melear*, 862 F.2d at 1186.

In conflict with the "integral participation" theory is the 'mere presence' or 'mere back up' theory relied upon by the Second, Sixth and Eleventh Circuit Courts of Appeals. In *Ghandi v. Police Dep't of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984), *cert. denied*, 484 U.S. 1042 (1988), the Sixth Circuit stated:

> As a general rule, mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability.

Ghandi, 747 F.2d at 352. The 'mere presence' or 'mere back-up' theory provides qualified immunity to law enforcement officers present during alleged constitutional violations, whose actions, in and of themselves, do not constitute a constitutional violation. *Ghandi*, 747 F.2d at 352; *see also, Howard v. Schoberle*, 907 F.Supp. 671, 682 n.6 (S.D.N.Y. 1995) (specifically declining to apply *Sadler* and/or *Melear* to find a back-up officer liable under the Fifth Circuit's broader-based theory of liability, finding the Fifth Circuit's authorities in conflict with other federal circuits). In the context of excessive force, the Eleventh

Circuit has concluded that only an officer who uses excessive force or who is in a reasonable position to intervene to stop the use of excessive force is precluded from his otherwise presumed protection under the doctrine of qualified immunity. *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) (reversing denial of qualified immunity for police officer whose actions did not constitute a constitutional violation and who had no reasonable opportunity to intervene to prevent another officer from using excessive force).

In this matter, the seven Petitioner-Officers were treated by the Second District Court of Appeal as though they were one 'integral' defendant, without any meaningful analysis of their individual participation in the incident and/or Mr. Magyar's evidence against them precluding them from their protection under qualified immunity. App., *Pet. for Cert.*, 10a-15a. The Second District's opinion in this regard is contrary to Eleventh Circuit precedent and fails to apply the 'objective reasonableness' test to each of the Petitioner-Officers' actions, as contemplated by this Court. *Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed"); *Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight . . . [.]").

CONCLUSION

The greater weight of federal law applies a Fourth Amendment analysis to determine the lawfulness of an officer's seizure of an individual for purposes of psychological evaluation because the Second District Court of Appeal's opinion failed to address the constitutionality of Mr. Magyar's seizure, the Second District has cast doubt as to the constitutionality of an otherwise lawful seizure pursuant to Florida's Mental Health Act. This Court should accept certiorari to clarify this area of the law.

The authorities of the Ninth and Fifth Circuit Courts of Appeals are in conflict with the authorities of the Second, Sixth and Eleventh Circuit Courts of Appeal as to the scope of an officer's liability for the alleged unconstitutional actions of his fellow officers. This Court should accept certiorari to clarify this area of the law.

Respectfully submitted,

DONALD A. SMITH, JR.
ANNE CAVANAUGH JONES
Counsel of Record
SMITH & TOZIAN, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
(813) 273-0063

Counsel for Petitioner-Officers

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA GENERAL CIVIL DIVISION

JEANNETTE THOMPSON,
as Plenary Guardian of
ROBERT MAGYAR and
CECILIA MAGYAR, Individually,

Plaintiffs,

v.

JARROD S. DOUDS, FRANKLIN M. DREES, VICTOR M. GOMEZ, SALVATORE S. MAZZA, KEVIN J. PETRY, CHARLES A. TRIGO, and JOHN WOMACK; and THE CITY OF TAMPA, FLORIDA, A MUNICIPAL CORPORATION.

Defendants. /

CASE NO.: 00-01147, DIV. "B"

AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR TRIAL BY JURY

Plaintiffs, Jeannette Thompson, as Plenary Guardian of Robert Magyar and Cecilia Magyar, individually, sue Defendants, Jarrold S. Douds, Franklin M. Drees, Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A. Trigo, and John Womack (hereinafter collectively referred to as "The Individual Defendants"), and The City of Tampa, Florida, a Municipal Corporation (hereinafter referred to as "The Defendant City"), and allege:

JURISDICTION AND VENUE

1. This is a civil action for money damages based upon violations by Defendants, while acting under color of state law, of certain rights guaranteed under the United States Constitution by wrongfully and without just cause inflicting serious bodily injury upon Robert Magyar.

* * *

breath. He lapsed into a coma, and to this date, remains in a coma.

COUNT I – VIOLATION OF FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS (AGAINST THE INDIVIDUAL DEFENDANTS)

25. Plaintiffs reaver and incorporate by reference the allegations of paragraphs 1-23, as if fully set forth herein.

26. The Individual Defendants were at all times well aware that Robert Magyar was an individual under physical and mental disabilities. They were further well aware that Robert Magyar was unarmed, that he posed no danger to them or to others, and that he was not suspected of any criminal activity.

27. Nevertheless, the seven police officers set upon Robert Magyar, for the ostensible purpose of restraining his freedom of movement so that he could be placed into an ambulance and taken to a hospital to receive medical care, pinning him to the ground, seating themselves upon his person, striking him, and using other "pain compliance" techniques upon him.

28. As a direct and legal result of the excessive force used by The Individual Defendants to subdue, restrain,

and take into custody Robert Magyar, he received serious physical injuries which caused him to lapse into a chronic and persistent vegetative state.

29. The actions of the Individual Defendants were intentional, malicious, reckless, and done without any regard for the health, safety and welfare of Mr. Magyar.

30. The Individual Defendants' actions in attempting to seize Robert Magyar's person were unreasonable, unjustified, unnecessary, and excessive to effect any lawful purpose that The Individual Defendants may have sought to accomplish. Such actions constituted (1) an unreasonable seizure of Robert Magyar under the Fourth and Fourteenth Amendments to the United States Constitution, (2) a deprivation of life and liberty without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and (3) a violation of Robert Magyar's right to freely associate with others under the First and Fourteenth Amendments to the United States Constitution.

31. As a further result of The Individual Defendants' actions, Robert Magyar has suffered serious and permanent physical injuries, has been forced to endure great physical and mental pain and suffering, has lost the capacity for the enjoyment of life, has sustained and will continue to sustain medical expenses, and has lost earning capacity. All of Plaintiff's injuries are permanent or continuing in nature.

COUNT II – VIOLATION OF FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS (AGAINST THE DEFENDANT CITY)

32. Plaintiffs reaver and incorporate by reference paragraphs 1-23, as if fully set forth herein.

33. The Defendant City is a real party in interest in this action by virtue of §§ 111.065-.071, Fla. Stat., pursuant to which The Defendant City is obliged to defend and indemnify the liability asserted against The Individual Defendants.

34. Furthermore, The Defendant City was at all times aware that confrontations between police officers and individuals suffering from physical and mental disabilities carried the potential for injury, loss of life, and other similar, disastrous outcomes on the part of both the mentally and physically disabled individuals involved, and on the part of its police officers.

* * *

omissions of The Individual Defendants, did, by reason of Robert Magyar's disability subject Robert Magyar to discrimination and deny him the benefits of the services, programs or activities of the Defendant City afforded to other citizens, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12132.

WHEREFORE, Plaintiffs, Jeannette Thompson, as Plenary Guardian of Robert Magyar, and Cecilia Magyar, individually, demand judgment against Defendants, Jarrod S. Douds, Franklin M. Drees, Victor M. Gomez, Salvatore S. Mazza, Kevin J. Petry, Charles A Trigo, and John Womack; and the City of Tampa, Florida, together with costs, attorneys' fees, interest, and any other relief

this Court deems just and proper in the premises. Plaintiffs further request a trial by jury of all issues so triable.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 24th day of March, 2000, to: Peter M. Walsh, Esquire, 696 First Avenue North, Suite 304, St. Petersburg, Florida 33701.

/s/ Daniel P. Mitchell
DANIEL P. MITCHELL, ESQUIRE
Florida Bar No. 302937
GARRY J. RHODEN, ESQUIRE
Florida Bar No. 139955
MICHAEL J. BRADFORD, ESQUIRE
Florida Bar No. 184314
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A.
501 East Kennedy Boulevard, Suite 1400
Post Office Box 3324
Tampa, Florida 33601-3324
(813) 273-5000
Facsimile: (813) 273-5145
E-mail: DMITCHELL@SFSELAW.COM
Attorneys for Plaintiffs